

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

United States Court of Appeals Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT for the District of Columbia Circuit

FILED OCT 24 1966

No. 20,383

Nathan J. Paulson
CLERK

CITY OF SAN ANTONIO, ET AL.,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

356

No. 20,464

THE GREATER TAMPA CHAMBER OF COMMERCE, ET AL.,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

No. 20,500

STATE OF WISCONSIN,

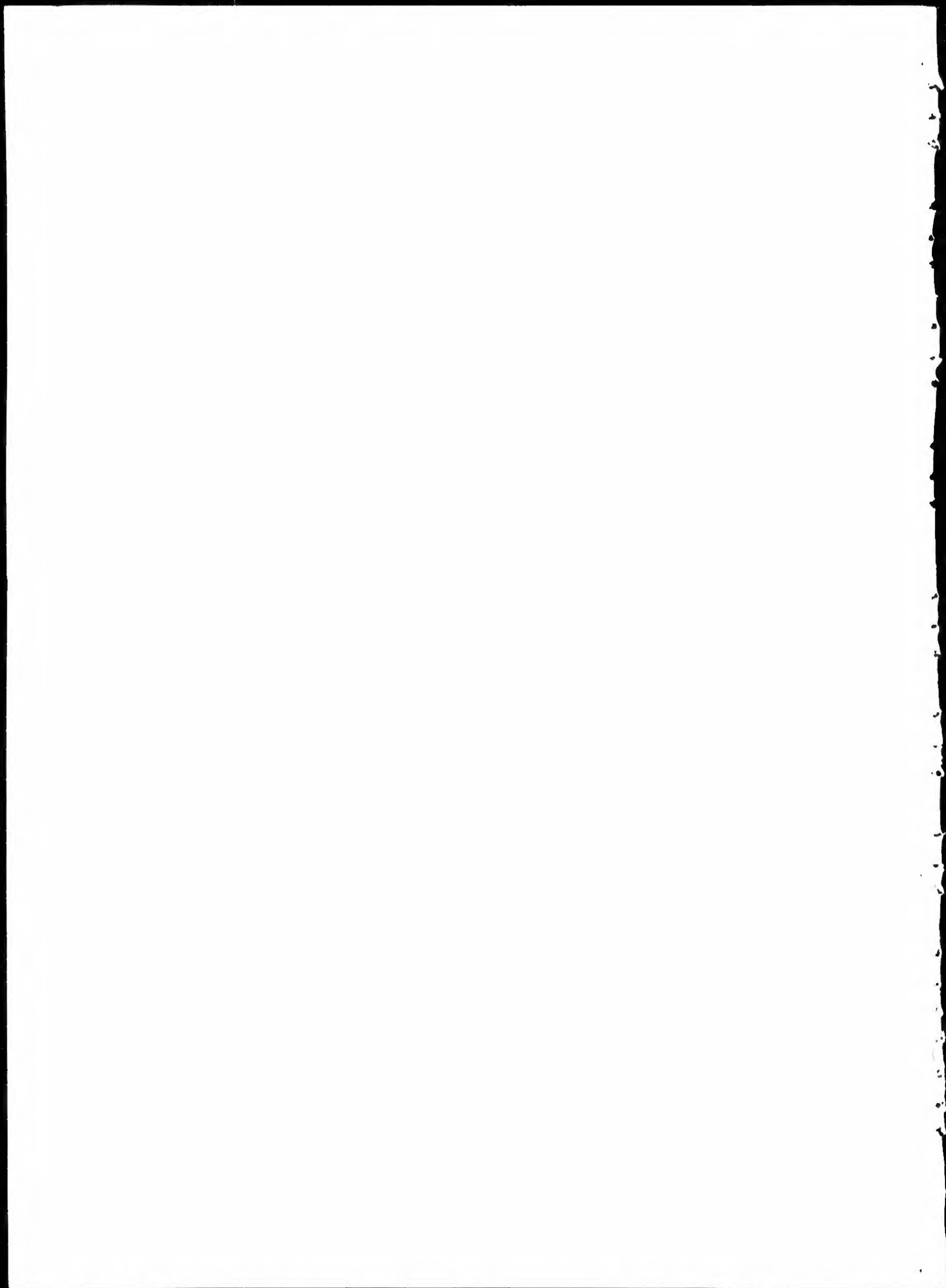
Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

ON PETITIONS FOR REVIEW OF ORDERS
OF CIVIL AERONAUTICS BOARD



(i)

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[1]

Order No. E-22314

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 15th day of June, 1965

In the Matter of the

TRANSPACIFIC ROUTE CASE

Docket 7723, et al.

**ORDER REOPENING DOMESTIC PHASE OF PROCEEDING
AND INSTITUTING NEW INTERNATIONAL INVESTIGATION**

By Orders E-20177 and E-20178, the Board terminated this proceeding on November 7, 1963. The "international phase", i.e., that part of the proceeding involving issues of foreign and overseas air transportation subject to the President's approval pursuant to Section 801 of the Federal Aviation Act, was terminated because the President had disapproved the Board's recommendations of December 7, 1960 for the award of various routes from points in United States territory to the Orient, and because the institution of a new or reopened proceeding for reexamination of that part of the transpacific route pattern was not then appropriate. The "domestic phase", i.e., that part involving issues of Mainland-Hawaii service constituting interstate air transportation not subject to Section 801, was terminated on findings by the Board that the interrelationship between routes from the Mainland to Hawaii and route to the Orient was such that a determination of the domestic issues without regard to the international requirements of Hawaiian service could seriously impede the freedom of the Board and the President in estab-

lishing a balanced and effective international route pattern in the Pacific, and that a properly coordinated pattern of domestic services between the Mainland and Hawaii could not be accomplished without assurances as to what the transpacific route structure ultimately would be.

Petitions for judicial review thereafter were filed with respect to Order E-20178 terminating the domestic phase of the proceeding. Western Air Lines, Inc., et al. v. Civil Aeronautics Board, C.A.D.C. No. 18,305, et al. In its decision therein of June 3, 1965, the Court of Appeals determined that the Board's order of termination was not supported by its findings. The Court held that the Board either should justify its determination that Mainland-Hawaii service cannot be authorized because of international air transportation

[2]

requirements with proper findings supported by the existing or a supplemental record, or, as we read the opinion, should decide at least the domestic phase of the case on its merits, again on the basis of the existing or a reopened record. A separate concurring opinion stated that the Court's remand might represent "a suitable occasion" for the Board to carry out its heretofore announced "intention to undertake a reexamination of the transpacific route pattern at a suitable time in the near future."

With regard to the questions of interrelationship between domestic and international operations and the needs for Mainland-Hawaii service, in our judgment the additional findings required by the Court should be made only after further evidentiary hearings upon a reopened record. The evidentiary hearings on the basic substantive issues in the domestic part of the proceeding were concluded on February 25, 1960. Our prior determination of appropriate domestic routes rested primarily on a forecast of 1962 operating results, based on 1959 and 1960 traffic data and various assumptions and conclusions as to the total volume of traffic, the routes by which it would move, and the extent of participation therein by the carriers selected for new domestic and international certificates. There have been substantial changes in traffic, equipment, and service. Since more recent data are now available, including several years of experience with jet equipment, we find it in the public in-

terest to reopen the record for further hearing on all issues relating to the domestic phase of the case, including the selection of the carrier to operate any route found to be required by the public convenience and necessity.

We also find that the public interest in the development of a sound air transportation system requires the institution of a new transpacific case. In January of 1961 the President suggested that the Board update the evidence in this case "within the next several years", and almost two years have elapsed since we stated our intention of reexamining "the transpacific route pattern at a suitable time in the near future." Since we last instituted a transpacific case, the upsurge of traffic and the advent of jet aircraft with their attendant economies have substantially changed the economics of transpacific operations. Both U. S. flag carriers are now operating so profitably in the Pacific that they have reported rates of return from 20 to 30% for these operations.^{1/} Moreover, the transpacific operations of foreign flag carriers appear to have flourished and there is every indication that traffic will continue to grow in the Pacific area. For all these reasons, we believe there is a need for a full reexamination of the Pacific route structure.

^{1/} The Board has found it advisable to urge a reduction in transpacific rates, although this objective has not yet been accomplished.

[3]

We further find that the reopened domestic phase of this proceeding and the new international investigation which we are instituting should be consolidated for purposes of hearing by the Board. If we were to hear the domestic phase separately, a determination of the interrelationship between international and domestic services would require consideration of much the same evidence that would be involved in making recommendations for possible changes in the United States flag pattern of international transpacific operations. Also, if we should restrict our further proceedings to the domestic phase, and if it should be determined that a domestic award cannot be made independently of international requirements, we would then be faced with the necessity of delaying the disposition of the domestic phase until completion of an international investigation. Thus, full proceedings now, although more

time consuming than limited proceedings, may permit the authorizing of new Mainland-Hawaii services sooner than otherwise might be possible if our further proceedings were confined only to the domestic phase. For these various reasons, we find that the public interest will best be served by consolidated proceedings which will permit an ascertainment and fulfillment of transpacific air transportation needs both to Hawaii and beyond Hawaii.^{2/} Subject to any modification or changes fixed after prehearing conference in accordance with our customary procedure, we intend the scope of the international investigation to coincide with the scope of the "international phase" of the Transpacific Route Case at the time of its termination.

Since the Court of Appeals has retained jurisdiction of this matter, our order will not become effective until any necessary permission has been obtained from the Court. Promptly after it becomes effective, a notice of prehearing conference will be issued. Unless such notice otherwise specifies, any motions with respect to the scope of the proceedings or for consolidation of applications shall be made no later than the date set for the prehearing conference.

IT IS THEREFORE ORDERED:

1. That, subject to such approval as may be deemed to be necessary by the United States Court of Appeals for the District of Columbia Circuit, (A) the domestic phase of this proceeding is hereby reopened for further evidentiary hearings, and (B) an investigation (Docket 16242) is hereby instituted and consolidated with such reopened proceeding for the examination of the pattern of operations by United States carriers in foreign and overseas air transportation in the Pacific and for the consideration and disposition of applications with respect to such air transportation.

^{2/} Of course, this procedure would not necessarily preclude the Board from deciding the domestic phase prior to completion of the international phase, if the record so warranted.

[4]

2. That application be made to the Court of Appeals for the District of Columbia Circuit in Western Air Lines, Inc., et al. v. Civil Aeronautics Board, No. 18,305, et al., for such appropriate action by said Court as may be required in order to permit the Board to proceed in accordance with the findings contained herein, and that paragraph 1 of this order shall be effective upon the date of any order issued by the Court of Appeals for the District of Columbia Circuit indicating or giving permission for such action.

3. That promptly after the effective date of paragraph 1, the Chief Examiner shall cause notice of prehearing conference to be issued and thereafter these proceedings shall be processed on an expedited basis.

By the Civil Aeronautics Board:

(SEAL)

HAROLD R. SANDERSON
Secretary

[5]

Order No. E-22995

ORDER DENYING APPLICATIONS

Adopted December 14, 1965

In response to our understanding of the directives heretofore issued to the Board on June 3 and July 26, 1965 by the United States Court of Appeals for the District of Columbia Circuit in Western Air Lines, Inc., et al. v. Civil Aeronautics Board, Nos. 18,305 and 18,313, we entered herein on September 3, 1965 our "Opinion and Order on Remand", E-22625. In that opinion, we made detailed findings based upon the record concerning present air services between the mainland and Hawaii, and the interrelationship of mainland-Hawaii services to operations beyond Hawaii to the Orient. Our ultimate findings in substance were (1) that, irrespective of international route considerations, the present record does not establish that there still exists the public interest need for additional mainland-Hawaii air transportation which was found in 1960 by the Board in Order E-16285 (32 C.A.B. 931) because of substantial subsequent changes which have occurred in the volume, type,

and fares of mainland-Hawaii service;^{1/} (2) that only additional proceedings will disclose whether mainland-Hawaii competitive service may still be in the public interest;^{2/} and (3) that, in any event, an

- 1/ The principal findings relied upon in 1960 in concluding that an additional mainland-Hawaii carrier was required were the then gentlemanly competition between the existing carriers Pan American World Airways and United Air Lines, the high load factors experienced by them over the mainland-Hawaii route, and the absence of economy fares. The subsequent changes detailed in our Opinion and Order E-22625, as indicated therein, have undermined these findings and preclude our reliance upon them or the making of similar findings concerning present operations.
- 2/ For that purpose, our Order E-22625 had renewed our proposal, initially made in Order E-22314, to reopen the domestic phases of this proceeding.

[6]

additional mainland-Hawaii carrier cannot be authorized on the present record because of international air transportation requirements. We also found that the public convenience and necessity do not require the certification of a carrier only for San Diego-Hawaii service.

However, in Order E-22625 we did not deny the application of Western Air Lines because our interpretation of the earlier judicial directives was that the Board was required only to submit for the Court further review specific findings in support of the challenged Board actions, and because we had proposed to ascertain the present public convenience and necessity requirements for mainland-Hawaii service by reopening the domestic portion of this proceeding (Order E-22314, June 15, 1965).

By order entered in the review proceeding on December 1, 1965, the Court found that under its prior directives the Board should either have granted or denied the pending application of Western Air Lines, and that after having fully considered the Board's "Opinion and Order on Remand" and the several pleadings and memoranda with respect thereto, the Court is satisfied that the petitioners in the review proceeding are entitled as a matter of right and in compliance with Section

401(d)(1) of the Federal Aviation Act to definitive Board action either issuing a certificate to Western or denying its application.^{3/} The Court has directed that the Board enter an order making a final disposition of the Western application within fifteen days.

We have heretofore fully considered the record in this proceeding, and the findings set forth in Order E-22625 reflect our judgment and discretion with respect to the question of additional mainland-Hawaii service. They embodied, and were intended to reflect, determinations by this Board that the requirements of international air service preclude any present grant of applications for mainland-Hawaii service, and that, apart from questions relating to international transportation, the present record will not support the certification of an

3/ Section 401(d)(1) (49 U.S.C. 1371(d)(1)) provides:

"The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied."

[7]

additional mainland-Hawaii carrier, or of a carrier to provide only San Diego-Hawaii service. Moreover, these determinations necessarily impel a denial of the Western Air Lines application under the provisions of Section 401(d)(1) in that an "application shall be denied" unless the Board finds that "the whole or any part of the transportation covered by the application . . . is required by the public convenience and necessity." Thus, other than relating these findings to an order of denial of the Western application and terminating the domestic phase of the Transpacific Route Case through a denial of applications, there is nothing more which this Board can do to achieve compliance with the instant directive by the Court.^{4/}

Accordingly, for these reasons and on the basis of the findings set forth in Order E-22625, we find that the public convenience and necessity do not require the whole or any part of the transportation covered

by the application herein of Western Air Lines, Inc., or, if they still be before us, by any other applications for service encompassed within the domestic portion of this proceeding. On the basis of this finding, we will formally vacate Opinion and Order E-16285, heretofore entered herein on December 7, 1960. So that our docket will reflect the Court's directives and our action herein, we also will formally vacate or amend our other orders to the extent that they purport to terminate the domestic phase of this proceeding without denying pending applications or purport to reopen the domestic phase of this case. We will deny all applications, thus terminating the so-called domestic phase of the Transpacific Route Case solely on the basis of such denials.

IT IS ORDERED That:

1. The following opinion and orders or portions thereof are hereby vacated:

- a. Opinion and Order E-16285;
- b. Paragraph 2 of the ordering clause of Order E-20178;
- c. Paragraphs 1, 2, and 3 of the ordering clauses of Order E-22314 except for that portion of paragraph 1 which provides that "subject to such approval as may be deemed to be necessary by the United States Court of Appeals for the District of Columbia Circuit . . . an investigation (Docket

4/ We note that a proper order of denial will leave the Board free to entertain new applications for mainland-Hawaii service, and when our instant order becomes final, the Board will entertain new applications for such service.

[8]

16242) is hereby instituted . . . for the examination of the pattern of operations by United States carriers in foreign and overseas air transportation in the Pacific and for the consideration and disposition of applications with respect to such air transportation"; and

d. Paragraph 2 of the ordering clause of Order E-22625.

2. The application of Western Air Lines, Inc. in Docket 10297, and all other applications in the domestic phase of this proceeding, are hereby denied.

By the Civil Aeronautics Board:

(SEAL)

HAROLD R. SANDERSON
Secretary

Member Adams did not participate in the adoption of the above order.

9

PETITION OF
THE CITY OF SAN ANTONIO, TEXAS,
AND
THE SAN ANTONIO CHAMBER OF COMMERCE
FOR LEAVE TO INTERVENE

Docket 16242

RECEIVED
DOCKET SECTION

APR 26 3 26 PM '66

CIVIL AERONAUTICS BOARD

Communications with respect to this
petition may be addressed to:

T. G. PETERS
San Antonio Chamber of Commerce
153 Navarro Street
San Antonio, Texas 78205

and

WILLIAM A. WILDHACK, JR.
730 - 15th Street, N. W.
Washington, D. C. 20005

Attorney for the City of San
Antonio and the San Antonio
Chamber of Commerce

Washington, D. C.

April 26, 1966

PETITION OF
THE CITY OF SAN ANTONIO, TEXAS
AND
THE SAN ANTONIO CHAMBER OF COMMERCE
FOR LEAVE TO INTERVENE

The City of San Antonio and the San Antonio Chamber of Commerce ("Petitioners") respectfully represent to the Civil Aeronautics Board that each has a substantial interest in the subject matter of the above-mentioned proceeding and further represent that their interests can only be properly represented if this petition for leave to intervene is granted.

The City of San Antonio is an incorporated municipality operating under a home rule charter issued by the State of Texas pursuant to the laws of said State. It owns and operates the San Antonio International Airport.

The San Antonio Chamber of Commerce is a non-profit organization incorporated under the laws of the State of Texas with principal offices at San Antonio,

Texas. Its objectives and purposes include, among other things, the development and promotion of the commercial, social, and cultural interests of this trading area. They also include coordination, cooperation, and assistance to similar organizations, particularly in the State

of Texas. These organizations are particularly interested in the provision of adequate air transportation between San Antonio and other parts of the United States and the world.

San Antonio is the metropolitan center of a very important and rapidly growing business, industrial, and agricultural area. There is a great community of interest between San Antonio and points concerned in this proceeding.

The above-entitled proceeding involves future air service across the Pacific.

San Antonio does not now receive single-carrier service to the Orient, but it is named as a point in the certificates held by applicants for such service which could, if the applications in this proceeding are successful, provide San Antonio with single-carrier service to Hawaii and the Orient. Petitioners' interests in such service require that it intervene. The result of this proceeding may also have an effect on the schedules and services operated at the airport.


Other communities will have an opportunity to present their cases, but no party to this case is in a position to present the deep concern of petitioners over the issues in the present proceeding.

To permit petitioners to intervene will not unduly broaden the issues and delay the proceeding, but, on the contrary, should be advantageous to the Board by giving the Board an opportunity to hear the case of San Antonio on the issues of public interest.

A copy of this petition has been served by mail, in accordance with Rule 8 of the Rules of Practice, on all parties on the list of parties supplied by the Docket Section.

WHEREFORE, petitioners pray that the Board grant this petition and that petitioners be permitted to intervene in the above-entitled proceeding and to become a party thereto for all purposes.

Respectfully submitted,


WILLIAM A. WILDHACK, JR.
730 - 15th Street, N. W.
Washington, D. C. 20005

Washington, D. C.

April 26, 1966

Attorney for Petitioner

[13]

Order No. E-23740

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at Its Office in Washington, D.C.
on the 25th Day of May, 1966

TRANSPACIFIC ROUTE INVESTIGATION

Docket 16242

CONSOLIDATION ORDER

By Order E-22314, dated June 15, 1965, the Board instituted this investigation to examine the pattern of operations by United States carriers in foreign and overseas air transportation in the Pacific. Thereafter, pursuant to notice from the Chief Examiner motions to consolidate over 40 applications were filed by 20 carriers, together with petitions by five cities requesting an inquiry into their Pacific air transportation needs.^{1/}

The applicants with timely filed applications include Pan American, all 11 domestic trunklines, three all-cargo carriers, two Pacific Northwest-Alaska carriers, and one applicant each in the categories of local service, Hawaiian, and supplemental air carriers. Answers to the various motions have been filed, and it is now appropriate for the Board to further delineate the scope of the proceeding.

General Scope. In Order E-22314 the Board stated that this proceeding would coincide generally in scope with the posture of the "international phase" of the Transpacific Route Case, Docket 7723, et al. at the time of its termination. Subject to changes made necessary by intervening events and the voluminous filings now before us, the Board adheres to that determination. In addition, consistent with our repeated findings concerning the interrelationship between domestic service involving the mainland and Hawaii and the balance of the transpacific route structure, applications for new mainland-Hawaii authority will be at issue. Accordingly, this case will be the vehicle for considering proposals involving service between the United States mainland, on the

one hand, and Hawaii and other areas of the Pacific to be served directly or through Hawaii, on the other hand.

-
- 1/ The identity of the carrier applicants and the general nature of their applications are set forth in Appendix A to this order.

[14]

Mainland Coterminals. The most difficult and controversial question for decision concerns the points on the mainland of the United States to be considered for direct transpacific service.

With the exception of possible route consolidations and domestic route extensions to permit mainland-Hawaii nonstop service, the Board's consideration in the Transpacific Route Case of mainland cities from which direct service to the Pacific could be provided was generally limited to the California gateways of Los Angeles and San Francisco, the Pacific Northwest cities of Portland and Seattle/Tacoma, and the Eastern and Midwestern coterminals of Boston, New York, Philadelphia, Baltimore, Washington, D.C., Detroit, and Chicago. The proposed service patterns extended across the Central Pacific to Hawaii and points beyond, and over Great Circle routings from the California cities, the Pacific Northwest gateways, and via the Alaskan intermediate points of Anchorage and Fairbanks. Applications of this same general character are now before us and it is the Board's intention that they again be placed in issue here.

Other applications for which consolidation has been sought are, however, so extensive in scope that they would produce a proceeding of virtually unlimited proportions. Some carriers which now provide no Pacific services and conduct only limited or regional domestic operations request authority to operate in the Pacific from almost every major traffic generating city in the United States. Still other applicants would raise the question of direct nonstop service to the Pacific from principal cities — and some less substantial from a traffic standpoint — by extension of domestic routes. American, for example, would have the Board consider authorizing service from its do-

mestic routes 4, 7, and 25, which serve over 40 cities, to Hawaii and beyond (Docket 16832, Amendment No. 1). By its application in Docket 17019, United seeks to serve directly Hawaii and all points on segments 5 and 6 of its transcontinental route 1.

While many of the parties appear to recognize the practical necessity for some limitation upon the mainland points to be considered, there is sharp divergence of opinion concerning the manner in which this result would best be accomplished. The most confining approach is that of Delta, which requests that the Board require a mandatory stop at existing Pacific gateways. If particular cities are to be designated as potential coterminals, various standards are proposed. The Bureau suggests that coterminals might be limited to those cities for which a particular applicant proposes to provide nonstop service, or alternatively, a standard of selection based on population, i.e., possibly 300,000 or more. More restrictive versions of the population standard are supported by Eastern (900,000 or more) and by Delta (over 2 million). United, without further elaboration, favors some selection concept predicated on traffic volume rather than population.

[15]

In view of the marked upsurge in traffic since the Transpacific Route Case was concluded and the ever-increasing economy, efficiency, and range of jet aircraft, the Board is convinced that it should expand substantially the U.S. mainland points to be considered for the authorization of direct Pacific service. At the same time, however, we are equally convinced that such expansion should not be accomplished by attempting to hear each and every new service proposal which has been the subject of an application or by considering the extension of domestic routes, either to Hawaii or beyond. Such an indiscriminate approach could produce a proceeding of unmanageable proportions and would seriously delay our reexamination of the transpacific route pattern, a matter which is deemed by the President and the Board to be one of high priority.

After weighing all of the various positions advanced by the parties, the Board has selected additional cities for consideration as mainland

coterminals on proposed services to Hawaii and to other areas in the Pacific, either directly or through Hawaii, in a manner which gives due regard to their size, traffic generating capacity, and geographical location. With minor exceptions necessitated by considerations of geographical balance, the cities selected are in the top 25 cities from the standpoint of population, with metropolitan area populations of 1 million or more, and rank in the top 25 mainland U.S. cities in terms of domestic passengers produced. These are the cities which can, in fact, most realistically be related to foreseeable future service requirements.

As has been noted, in the East direct service from Boston, New York, Philadelphia, Baltimore, and Washington, D.C. was at issue in the Transpacific Route Case. They will be included here, together with Buffalo/Niagara Falls and Pittsburgh. The Midwest will be provided ample coverage by the inclusion of the previously considered points of Detroit and Chicago and the addition of Cleveland, Kansas City, Mo., Minneapolis/St. Paul and St. Louis. Denver is a natural selection as the principal traffic generator in the Rocky Mountain states area.

Although cities in the South and South Central area have not previously been considered for direct service to and from the Pacific, the Board believes that the time has come when their needs should at least be explored. Atlanta and Miami are primary traffic and population centers in the South and the same is true as to Dallas, Houston and New Orleans in the South Central area. We have selected Phoenix as the representative city in the Southwest. While Phoenix is not as large as other cities selected from the standpoint of population, it develops a substantial volume of traffic and is an established air transportation hub in its particular region.

On the West Coast, Los Angeles and San Francisco have been and remain the primary California gateways. Hawaiian service to and from San Diego was a substantial issue in the prior proceeding, and we are aware of no reason to exclude San Diego from consideration here for direct service to Hawaii and other areas of the Pacific. Seattle/Tacoma and Portland continue to be the traditional terminals or co-

terminal points for a variety of Pacific services from the Northwest. As to Alaska, we have previously expressed our

[16]

intention to again consider the proposals which would include Anchorage and Fairbanks as intermediate points on Pacific Great Circle routings. In addition, the applications for Anchorage-Hawaii turnaround service by Alaska Airlines (Docket 15635) and by Pacific Northern (Docket 17023) can be heard at this time without unduly impeding the proceeding.

The 13 new cities selected as potential coterminals, which lie east of the West Coast gateways, produce a reasonable balance of size, traffic and geography. It does not necessarily follow, however, that cities within given geographical areas should be designated as separate groups of coterminals. As in the original proceeding, decision on that matter will await the development of the record.^{2/}

Some of the applicants request removal of domestic restrictions or other changes in their existing operating authority within the 48 contiguous states. All such issues will be excluded, for to do otherwise would greatly complicate and delay the proceeding. Moreover, questions of this character are not germane to our basic purpose of reexamining the transpacific route structure. The Board is therefore including an express provision in this order to make clear that no award of authority to provide interstate air transportation between the 48 contiguous states will result from this proceeding. This provision would not, of course, preclude a successful applicant from carrying local traffic between designated mainland coterminals if it already possesses domestic route authority between the points involved.

Mexico, Central and South America. Several applicants raise issues of service between foreign countries in the Western Hemisphere, on the one hand, and points in the Pacific, on the other hand. Braniff in Docket 17004 has applied for points in Panama/Canal Zone, Peru and Chile as intermediates between mainland coterminals and the Pacific subject to a prohibition, at least for the present, against the car-

riage of local traffic between the United States and the Central and South American points. In Docket 16357 Eastern requests an extension of its route 131 from Mexican points as intermediates to Hawaii and beyond, while Western (Docket 17043) seeks to add both Mexico City and Acapulco as coterminals with mainland cities on operations to Hawaii and other points in the Pacific. The Bureau urges the exclusion of such issues, except for Mexico City.

With the exception of Mexico, the Board will not consider such questions at this time since they do not, in our view, bear directly on the principal issue of U.S.-Pacific service presently under investigation. No such proposals were before the Board previously and we are not persuaded that there is any substantial reason for our considering them now. Routings via other countries of the Western Hemisphere are not traditional ones for U.S.-Pacific traffic, and the probable benefits are too remote to warrant exploration of these questions in a proceeding which, at its minimum, must be a large and complex one.

2/ See Order E-13881, May 15, 1959, p. 6.

[17]

Mexico lies near a great circle routing to Oceania and the South Pacific, a routing which has been found useful by one foreign air carrier. The Board does not wish to preclude itself at the outset from at least considering the possible combination of mainland coterminals with coterminals in Mexico. No questions of new or additional local traffic rights between the United States and Mexico are to be tried in the proceeding.

Hawaii and Alaska. The applications as they relate to Hawaii raise a variety of service possibilities. Some conform to the present service pattern and are restricted to Honolulu, on Oahu; others seek certification to the state of Hawaii, without further specification; and still others specify Hilo, Kahului, and Lihue, in addition to Honolulu.

In view of the burgeoning economy of Hawaii, its increasing attractiveness as a resort center, and the high degree of dependence by

its population on air service, the Board believes that it is desirable to obtain the maximum flexibility to determine the manner in which any needed service should be provided. Therefore, we will not restrict our consideration to Honolulu but will consider authorizing service to other points within the state for which specific application has been made. Any awards involving both Honolulu and points in the neighbor islands will, however, be subject to a closed door restriction prohibiting the holder from providing air transportation between Honolulu and such points. Consideration of local air service between the islands would inject into the proceeding controversial new issues concerning the authorization of service competitive with that of the certificated Hawaiian carriers, and is not necessary to a sound disposition of the present investigation.

In addition to the matter previously discussed concerning Alaska, Northwest asks that the Board exclude consideration of any new or additional Seattle/Portland-Honolulu service proposals. Pan American joins in this request, at least insofar as such proposals raise issues of new turnaround service between the Pacific Northwest and Hawaii. However, about six years have elapsed since the Board last focused on the needs of this area.^{3/} Since these markets were previously at issue and are a traditional part of the Pacific route complex, we find no substantial reasons for excluding them from the total picture now under consideration.

Some of the applicants seek authority for new or additional local service between Alaska and the 48 contiguous states. The cities of Houston and Oakland, for example, would raise broad issues concerning their needs to and from Alaska, not necessarily limited to service beyond Alaska to the Pacific. Pan American, supported by the State of Alaska, seeks authority to

^{3/} Pacific Northwest-Hawaii Renewal Case, 30 C.A.B. 995 (1960).

[18]

carry local traffic between eastern and midwestern mainland coterminals and Fairbanks on flights originating or terminating in the Orient. Wein Alaska Airlines wishes to be heard on its application in Docket 17091 for Fairbanks and Juneau-Minneapolis/St. Paul and Chicago authority if the Board is to consider the needs of local traffic between the midwest and Fairbanks, while Pan American's application prompted a request from Northwest for similar authority between California points and Anchorage.

As in the prior case,^{4/} we will eliminate all such issues from this proceeding. The Pacific Northwest-Alaska route pattern has only recently been reexamined.^{5/} Inclusion of these or similar issues now has not been shown to be necessary to the economic success of the Great Circle routings or otherwise essential to adequate consideration of the transpacific route structure. On the other hand, by increasing the number of parties and issues, exploration of these matters inevitably would complicate the proceeding and delay decision. Our exclusion of domestic service questions will, therefore, extend not only to operations between points in the 48 contiguous states but also between such points, on the one hand, and points in Alaska, on the other hand.

Local Service in the Pacific. The Bureau of Operating Rights (Bureau) has moved that issues concerning inter-island local air services in the South, Central and Western Pacific, notably among the islands comprising the United States Trust Territories, be excluded from this proceeding and be heard in a separate investigation.^{6/}

We find that the Bureau's motion has merit and it will be granted. In this area, overseas rather than foreign air transportation is principally involved. Moreover, as asserted by the Bureau, the primary need among these islands would appear to be for local service with small equipment to serve relatively sparse volumes of traffic. Questions of this kind would tend to become dwarfed in a proceeding concerned mainly with long haul transportation requirements and they can best and most expeditiously be decided separately.

While the Board has decided to exclude all such issues from the

proceeding, the pleadings before us leave some uncertainties concerning the desirable scope of the separate investigation. As Hawaiian Airlines has pointed out, some consideration should be given initially to, among other things, the matter of possible terminal points which would permit inter-island traffic to move to and from more distant destinations. The Board intends to give further attention to the precise scope of the separate investigation, after which it will issue an appropriate order.

4/ Order E-13881, supra, at pp. 2-3.

5/ Pacific Northwest-Alaska Air Service Case, Orders E-21955, March 26, 1965, and E-22242, June 1, 1965.

6/ The Islands included in the Bureau's motion are: Palau Islands; Mariana Islands; Caroline Islands; Marshall Islands; Gilbert Islands; Ellice Islands; New Hebrides; Fiji Islands; Samoa (American and Western); Tonga Islands; and Cook Islands.

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To the extent that there are proposals in the applications now before us which request authority to serve points in the general area of the separate investigation as part of a long haul transpacific operation, they will be heard in the present proceeding. Our action in severing out the Pacific local service issues for separate treatment shall in no way delay the processing of the present case.

Western Boundary. After considering the comments of the various parties, the Board has decided to adopt the Bureau's position and to establish longitude 70° east as the western limit of this proceeding. Thus the area for consideration is that lying east of longitude 70° east, except that route requests involving points on the Chinese mainland and in the U.S.S.R. will not be heard.

This western boundary will encompass points as far west as India and Pakistan and coincides generally in this respect with the scope of the Transpacific Route Case. Chinese mainland points were not considered previously in view of the long standing deferral of such mat-

ters stemming from the Transpacific Certificate Renewal Case,^{7/} and Pan American's request for an extension of its route beyond India and Pakistan to Moscow was excluded " * * * in view of the relatively extreme length of this extension and the necessarily speculative character of any evidence that would be offered relating to the prospective use of such a routing * * *."^{8/} Nothing has been advanced which would warrant a different result under present circumstances.

The application of TWA (Docket 16974, Amendment 1) poses a special situation. TWA is now a domestic and transatlantic operator, with its transatlantic route 147 extending as far east as Hong Kong. TWA seeks a transpacific route from the West Coast via intermediates to Hong Kong that would enable it to provide a round-the-world service. However, TSA has yet to acquire landing rights at Hong Kong, and to overcome that problem should it persist, the carrier alternatively requests an extension of its route 147 eastward across the Pacific to the west coast via the points enumerated in its Pacific route application. The Bureau opposes TWA's alternative request, apparently because of the impact which the proposed extension of the transatlantic route might have on the issues in the present proceeding.

We do not deem it necessary or desirable to explore herein questions of direct service between transatlantic and transpacific routes overflying junction points, such as are raised by a portion of Pan American's application in Docket 15559 (Amendment No. 1). However, consideration of some eastward extension of TWA's transatlantic route is nothing new to transpacific route proceedings. In fact, it was in the Transpacific Route Case that TWA received

^{7/} 20 C.A.B. 47 (1955).

^{8/} Order E-13881, supra, p. 7.

the extension of its route 147 beyond Bangkok to Hong Kong. In the same case, the Board considered, but did not recommend, an extension of route 147 beyond India as far east as Tokyo. Under the circum-

stances, the Board finds no valid objection to consolidation herein of TWA's alternative request insofar as the carrier seeks an extension of its transatlantic route to Tokyo, which, in conjunction with the transpacific route it seeks, would permit a round-the-world service. As in the case of other authorizations that might result from this proceeding, the parties will be free to urge the imposition of such terms, conditions and limitations as are deemed appropriate.

Common Fares and Tariff Provisions. Hawaiian Airlines requests inclusion of a common fares investigation with this proceeding. The thrust of this request is that the Board determine whether air transportation services which may be rendered to any of the neighbor islands of Hawaii should be provided for the same rates and fares from mainland points as are fixed for traffic between the mainland and Honolulu. Hawaiian's motion is opposed by the Bureau and the existing mainland-Hawaii carriers.

The Board is persuaded that questions of compelling common fares have no place in this proceeding. As the Board has pointed out before,⁹ a decision to compel common fares would require, among other things, a determination that existing fares are unlawful. The addition of such complicated rate issues to the extensive route questions which must be decided is neither feasible nor desirable and would materially delay final resolution of this proceeding.

This is not to say that the matter of fares and charges has no relevance. On the contrary, the fare structure between the mainland and the neighbor islands is a matter of direct interest and concern. The various applicants may and should set forth their fare proposals for evaluation along with other matters which bear on the public interest.

We suggest that each applicant should also set forth, as a matter bearing on the public interest, its proposals for the protection of its passengers in terms of whether it will provide in its tariffs (1) a limitation of liability for each passenger for death, wounding, or other bodily injury within the limits set forth in Agreement C.A.B. 18900 and approved by the Board in Order E-23680 or such other limits as may be subsequently approved; and (2) that the carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of

the Warsaw Convention or such Convention as amended by the Hague Protocol.

Property and Mail Only. In view of the existing commitments of this country in areas of the Pacific, and considering the particular interest of the Department of Defense in additional transpacific commercial cargo capability, inclusion of the applications proposing property and mail only authorizations is clearly in the public interest.^{10/} These applications will be considered on the same route basis as applications by combination carriers, i.e., from the designated mainland coterminals to the Pacific, with no local traffic rights between such coterminals

^{9/} Hawaiian Common Fares Case, 37 C.A.B. 269 (1962).

^{10/} The pertinent applications are those of Flying Tiger in Docket 15830 (Amendment 1); Seaboard World (Docket 17028); and Slick (Docket 14552, Amended).

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in the absence of existing operating authority to provide the service. As in the case of the combination carriers, it is our intention that there be no change as the result of this proceeding in the authority of all-cargo carriers to engage in interstate air transportation between the 48 contiguous states or between such states, on the one hand, and Alaska, on the other hand.

Military Bases. Several applicants and the Department of Defense again raise an issue concerning flag stop service at military bases for the carriage of military personnel and cargo. The Department specifically requests that any certificates to be issued which include the terminal point Seattle/Tacoma also include McChord Air Force Base, Washington; those for the terminal point San Francisco/Oakland also include Travis Air Force Base, California; and those for Los Angeles/Burbank also include Norton Air Force Base, California. Some parties, particularly the Bureau and Northwest, oppose consideration of these questions primarily for the reason that the Board pre-

viously decided against certification for these purposes in the Trans-pacific Route Case and the recently concluded Transatlantic Route Renewal Case.^{11/} In its answer the Department asserts that it was not a party to the former case and did not address itself to this issue in the latter proceeding.

It is true that heretofore the Board has found that specific situations requiring service directly to military bases could best be handled by exemption rather than certification. However, in view of the Department's present position and its apparent willingness to support its request, no reason is evident why it should not at least be afforded the opportunity to do so. The question of possible certification at the three Air Force bases specifically included in the Department's request will not add materially in scope or burden to the issues in the proceeding.

Stopovers. The filings of several of the parties are concerned with the issue of whether applications should be heard which request the authority to grant stopover privileges at mainland coterminals for traffic destined to Hawaii or beyond to other areas of the Pacific.

As United points out, the right to engage in the carriage of U.S. stopover traffic is not one that has ordinarily been granted to U.S. international carriers. On the other hand, in international operations the stopover privilege may be a valuable one in placing U.S. flag carriers on a basis of competitive equality with foreign flag operators which can accord passengers traveling on through tickets stopovers at coterminal points in the United States so long as the transportation between the U.S. points is only incidental to a bona fide journey to or from a foreign point. Moreover, pursuant to this principle certain foreign carriers may now provide stopover privileges at Hawaii and mainland points. Existing and foreseeable foreign competition in the Pacific warrants our examination of whether comparable stopover rights should be granted to U.S. flag carriers. We will therefore consider the question of stopover rights at

^{11/} 32 C.A.B. 928, 995-6 (1961); Order E-23230, February 11, 1966, Appendix, pp. 130-131.

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mainland coterminals, limited, however, to traffic moving to and from Hawaii and in overseas or foreign air transportation. Any carrier receiving an award herein may, of course, conduct operations in any manner permissible by combining the new authorization with previously existing authority.

Interchanges. National has filed a petition for institution of an investigation concerning the desirability of providing U.S.-Pacific area services by means of equipment interchanges (Docket 17054) and has moved consolidation of such an investigation with this proceeding. The only affirmative support for this proposal is that of the Bureau.

As has been shown by experience, interchanges, particularly in the international field, tend to become unwieldy and raise many complex issues. The difficulties are compounded where, as here, no voluntary interchange proposals are before the Board and the issues must then center around the power of, and the need for, the Board to compel them. Under these circumstances, and considering the multitude of opportunities that will be afforded by the extensive applications at issue directly to authorize any needed service, no useful public purpose would be served by granting National's petition.

Route Construction. As might be expected from the large number of applicants, the applications for which consolidation is sought contain a variety of proposals concerning the manner in which the routes requested should be constructed. Many contain the usual requests pertaining to international operations, such as the right to begin and/or terminate flights short of terminals, to conduct direct nonstop service omitting one or more intermediate points, etc. Some are based on an area concept; others request overlapping linear route descriptions; and still others seek authority to cross segments and omit junction points.

As far as the applications limited to mainland-Hawaii operations are concerned, route descriptions should present no significant problem, since under the issues as we have established them, the authorizations to be considered are those that would authorize operations di-

rectly between mainland coterminals and points in Hawaii. In the international field, the typical certificates are exemplified by those of Northwest and Pan American which utilize the approved service plan procedure. In order that no proposals for feasible and desirable flexibility are overlooked, variations from this procedure which are proposed by the parties will be in issue. Each applicant should, of course, make clear in its presentation the precise type of authority desired.

Civic Parties. Petitions by civic bodies seeking an investigation of their particular air transportation needs in relation to the Pacific area were filed by Houston (Docket 17030), Oakland (Docket 17031), San Diego (Dockets 17016 and 17046), San Jose (Dockets 17050 and 17051), and Spokane (Docket 17060).

Houston and San Diego have been designated as potential mainland coterminals and their air service requirements will be considered to the extent that they fall within the issues. Under the circumstances, their petitions will be dismissed. With respect to the remaining three cities, the Board finds that no necessity for a separate investigation of direct

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transpacific service has been established and their petitions will therefore be denied. However, in view of Oakland's historically close relationship with San Francisco from an air transportation standpoint, parties will be free to urge, if they so desire, that Oakland should be hyphenated with San Francisco in any awards made as the result of this proceeding.

Subsidy Eligibility. The Bureau specifically requests that the Board declare at the outset that no authorizations resulting from this case will be eligible for subsidy. Since there is no indication that such a restriction is required or would serve a useful purpose in a proceeding of the present nature, this request will be denied.

Restrictions. The specific pre-set restrictions which the Board is imposing have been discussed previously and require no further elaboration. The issue of whether other or further terms, conditions,

and limitations should be imposed will remain open so that the parties may address themselves to it during the course of the proceeding. Thus, questions of whether the Board should further limit authorizations, such as by the imposition of long haul restrictions on given operations in particular areas, will be determined when the evidentiary record is before us.

Late-filed Applications. In addition to the motions filed in compliance with the Chief Examiner's notice, motions to consolidate applications have been filed by Airlift International, Inc. (Dockets 17149 and 17150) and Trans International Airlines, Inc. (Docket 17151). These motions were not filed until after the date established in the Chief Examiner's notice and are therefore untimely. ^{12/} Since good cause has not been shown for the late filings these motions will be dismissed. ^{13/}

Also, some 40 days after the cut-off date established by notice for the filing of motions to consolidate, Northern Consolidated Airlines, Inc. filed a contingent motion to consolidate herein its application in Docket 17220 which requests a route between Alaska and Hawaii. The applicant's theory is that this investigation is now limited to foreign and overseas air transportation in the Pacific, and that if the Board should add issues of mainland-Hawaii service which involve interstate air transportation, the carrier's failure to file earlier is excused. ^{14/}

^{12/} See e.g., Order E-18435, June 11, 1962, fn. 2.

^{13/} Motions for leave to file replies to various objections to their motions to consolidate were filed by Airlift and TIA. Both replies have been received and we have considered the contentions therein in reaching our decision.

^{14/} More specifically, in support of its motion Northern Consolidated asserts that the Board's order instituting this investigation was restricted to foreign and overseas air transportation in the Pacific, whereas the carrier's application involves interstate air transportation; that the Board's rules (Rule 915(b)) provide that if the Board by subsequent order adds to the scope of the proceeding carriers have a further opportunity to request consolidation of applications pursuant to Rule 12; that if the Board now undertakes to consider the interstate mainland-Hawaii applications, such action will constitute an addition to the issues within the meaning of the rules; and that since a motion to consolidate submitted after such

an order would be timely, a fortiori it is timely if filed in advance thereof.

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When the Board instituted this investigation it made clear that it contemplated a consolidated proceeding involving all operations between the mainland and the Pacific — to Hawaii, as well as beyond.^{15/} Mainland-Hawaii issues were to be heard by reopening and consolidating the domestic phase of the Transpacific Route Case, and it was only by reason of the requirements of litigation that this portion was technically removed from the consolidated proceeding which the Board envisioned.^{16/} And even in taking this action, the Board left no doubt that it would entertain new applications for mainland-Hawaii service.^{17/} All of these various orders were cited in the Chief Examiner's notice calling for filings directed to the scope of this case. In view of this background, any asserted lack of knowledge that mainland-Hawaii issues were to be considered is not convincing. Since Northern Consolidated's request was not timely filed and good cause has not been shown for the late filing, its motion also will be dismissed.^{18/}

Further Procedures. With the scope of the proceeding established by this order, it is our intention that this investigation promptly be set for prehearing conference. The Examiner will establish the most expeditious possible procedural schedule consistent with the rights of the parties and the development of an adequate record.

The Board recognizes that in view of the broad expanse of the present investigation the applicants were faced with some uncertainties in framing their applications, particularly as to the points of the United States mainland that would be involved. In recognition of this fact, and in order to provide adequate notice at the outset of the specific portions of pending applications that will be prosecuted, we will provide a period of 10 days from the date of service of this order within which applicants with timely filed applications may, if they so desire, amend such applications to conform to the scope of the proceeding as it has been set by the Board. Upon a finding by the Board that

such amended applications so conform, they will be substituted for the prior filings of the same parties.

Any petitions for reconsideration of the present order will be filed with the Board in accordance with the provisions of Rule 37.

15/ Order E-22314, June 15, 1965.

16/ Order E-22995, December 14, 1965.

17/ Id., fn. 4.

18/ On April 20, 1966, TWA filed and moved consolidation of Amendment No. 2 to its application in Docket 16974. Since the motion is untimely it also will be dismissed. However, TWA, as an applicant having a timely filed application before the Board, will have the opportunity subsequently to file an amended application conforming to the scope of the proceeding as established by the Board in accordance with the procedure hereinafter outlined.

New Orleans also filed a petition for institution of an investigation of its needs (Docket 17255) and moved to consolidate. Since New Orleans is being considered as a potential coterminal, its petition and motion, like those of Houston and San Diego, will be dismissed.

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ACCORDINGLY, IT IS ORDERED THAT:

1. Subject to the provisions of this order, this investigation shall be concerned with service between the mainland of the United States, on the one hand, and Hawaii and other areas of the Pacific that would be served directly or through Hawaii, on the other hand. Included are issues relating to proposed authorizations via existing gateways over Central Pacific and Great Circle routings as well as questions of certifying direct service to and from the additional mainland coterminal points designated herein;

2. The potential mainland coterminal points at which certification of service is to be considered are as follows:

(a) East. Boston, Mass.; Buffalo/Niagara Falls, N.Y; New York

(N.Y.)/Newark (N.J.); Philadelphia and Pittsburgh, Pa.; Washington, D.C. and Baltimore, Md. (or Washington/Baltimore);

- (b) Midwest. Chicago, Ill.; Cleveland, Ohio; Detroit, Mich.; Kansas City, Mo.; Minneapolis/St. Paul, Minn.; and St. Louis, Mo.;
- (c) South and South Central. Atlanta, Ga.; Miami, Fla. (or Miami/Ft. Lauderdale); Dallas (or Dallas/Ft. Worth) and Houston, Tex.; New Orleans, La.;
- (d) Southwest. Phoenix, Ariz.;
- (e) Rocky Mountain. Denver, Colo.; and
- (f) West Coast. Los Angeles (or Los Angeles/Long Beach or Los Angeles/Burbank), San Diego, and San Francisco (or San Francisco/Oakland), Calif.; Portland, Ore.; and Seattle/Tacoma, Wash.;

3. The question of whether any of the cities listed in paragraph 2 which are within the same geographical areas should be designated as separate groups of coterminal points shall be tried in the proceeding;

4. Applications requesting the designation of Anchorage and/or Fairbanks, Alaska, as intermediate points on transpacific Great Circle routings shall be heard, as well as those proposing authorizations at (1) Anchorage or Cold Bay as coterminals or intermediate points for property and mail routes and (2) Anchorage as a terminal point for Alaska-Hawaii turnaround services;

5. The points to be considered for certification within the state of Hawaii are Hilo, Hawaii; Honolulu, Oahu; Lihue, Kauai; and Kahului, Maui;

6. The western boundary of this investigation shall be longitude 70° east; provided, however, that applications seeking certification at points on the Chinese mainland or in the U.S.S.R. will not be heard; and provided further, that Trans World Airlines' alternative request in its application (Docket 16974, Amendment 1) shall be at issue to the extent that it requests an extension of the carrier's transatlantic route 147 beyond India as far east as Tokyo;

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7. In addition to the foregoing exclusions, the Board will not consider herein applications which seek authority to:

- (a) engage in interstate air transportation between points within the 48 contiguous states or between points in such states, on the one hand, and points in Alaska, on the other hand;
- (b) provide mainland-Pacific services via foreign countries in the Western Hemisphere, except those requesting the designation of coterminal points in Mexico;
- (c) accord stopover privileges to traffic moving in interstate air transportation, other than to and from Hawaii or between points within Hawaii; and
- (d) provide service between points or areas covered by separate transatlantic and transpacific certificates without serving foreign terminal points as intermediates, connecting or junction points;

8. Authorizations granted to permit service between points in the islands of the state of Hawaii will preclude the holder from providing air transportation of persons, property and mail between such points;

9. A specific issue for determination shall be whether any certificates to be issued which include Seattle/Tacoma should also include McChord Air Force Base, Washington; those for San Francisco should also include Travis Air Force Base, Calif.; and those for Los Angeles should also include Norton Air Force Base, Calif.;

10. Issues concerned with inter-island local air service in the Pacific are hereby severed from the present proceeding and will be heard in a separate investigation entitled the Pacific Islands Local Service Investigation, assigned Docket No. 17353. The separate investigation will, in general, be concerned with local air service in the South, Central and Western Pacific of the kind set forth in the Bureau's "Motion to Exclude and to Institute a Separate Investigation", filed herein on March 22, 1966, and in the applications of Hawaiian Airlines, Inc. (Docket 17047) and World Airways, Inc. (Docket 17036). The Board will, however, give further attention to the precise scope of the sepa-

rate investigation and thereafter issue an appropriate order. Timely filed applications now before the Board which request authority to serve points in the general area of Docket 17353 as part of a long haul trans-pacific operation will be heard in the present proceeding;

11. The following applications are consolidated for hearing and decision herein to the extent that such applications conform to the scope of this investigation as established by this order: Alaska Airlines, Inc., Dockets 15635, 16749 and 17038; American Airlines, Inc., Docket 16832 (Amendment 1); Braniff Airways, Inc., Docket 17004; Continental Air Lines, Inc., Dockets 15836 (Amended) and 16616 (Amended); Delta Air Lines, Inc., Dockets 17024, 17025, 17133 and 17134; Eastern Air Lines, Inc., Docket 16357 (Amendments 1, 2, and 3); The Flying Tiger Line, Inc., Docket 15830 (Amendment 1);

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National Airlines, Inc., Dockets 17052 and 17053; Northeast Airlines, Inc., Docket 17041; Northwest Airlines, Inc., Dockets 17039 and 17040; Pacific Air Lines, Inc., Docket 17032; Pacific Northern Airlines, Inc., Docket 17023; Pan American World Airways, Inc., Docket 15559 (Amendments 1 and 2), 15440 (Amendments 1 and 2) and 15140; Seaboard World Airlines, Inc., Docket 17028; Slick Corporation, Docket 14552 (Amended); Trans World Airlines, Inc., Docket 16974 (Amendment 1); United Air Lines, Inc., Dockets 17018 (Amendment 1) and 17019; Western Air Lines, Inc., Dockets 17042 and 17043; and World Airways, Inc., Docket 17035;

12. The applicants listed in ordering paragraph 11 hereof may, within 10 days after the date of service of this order, file amended applications conforming to the scope of the proceeding as it has been set by the Board, which upon further Board order will supersede and be substituted for prior filings of the same parties;

13. Portions of the applications listed in ordering paragraph 11 which are not consolidated herein by this order are dismissed;

14. The applications of Hawaiian Airlines, Inc. (Docket 17047, Corrected) and World Airways, Inc. (Docket 17036) shall be heard in the Pacific Islands Local Service Investigation, Docket 17353, insofar as

they propose inter-island local service in the area of the South, Central and Western Pacific;

15. The motion of Hawaiian Airlines, Inc. to broaden the issues to include a common fares investigation, and the petition of National Airlines, Inc. (Docket 17054) for institution of a mainland-Pacific interchange investigation and its consolidation with this proceeding, are denied;

16. The petitions for institution of investigations and motions to consolidate filed by Houston (Docket 17030), New Orleans (Docket 17255) and San Diego (Dockets 17016 and 17046) are dismissed, and those of Oakland (Docket 17031), San Jose (Dockets 17050 and 17051), and Spokane (Docket 17060) are denied;

17. The motions by Airlift International, Inc., (Airlift) and Trans International Airlines, Inc. (TIA) for leave to file unauthorized documents (replies to answers to their motions to consolidate), and by Aloha Airlines, Inc., for leave to file an answer to motions to consolidate, are granted;

18. The motions to consolidate late-filed applications by Airlift (Dockets 17149 and 17150), Northern Consolidated Airlines, Inc. (Docket 17220), TIA (Docket 17151), and Trans World Airlines, Inc. (Docket 16974, Amendment 2) are dismissed; and

19. Except to the extent granted herein, all motions to consolidate application and other requests addressed to the issues are denied.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON
Secretary

(SEAL)

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Transpacific Route Applications *

Route descriptions are detailed and technical, and reference should be made to the applications themselves for an exact description of the routings and points requested. The listing in this appendix is intended to give only a general indication of the geographical scope involved and the areas affected.

Alaska Airlines, Inc.

Docket 15635 — Anchorage-Honolulu.

Docket 16749 — Seattle-Honolulu.

Docket 17038 — Seattle-Honolulu via Portland.

American Airlines, Inc.

Docket 16832 (Amendment 1) — Mainland points on domestic routes 4, 7, & 25 as coterminals (a) to Japan, Korea, Taiwan, Hong Kong, Viet Nam, and Singapore, directly and via Hawaii (Hilo and Honolulu) and the Central Pacific to Japan and beyond; (b) to Hawaii (Hilo and Honolulu), American Samoa, Fiji Islands, Australia, Indonesia, to Singapore and beyond to Japan as in (a).

Braniff Airways, Inc.

Docket 17004 — (1) Mainland coterminals of New York and Miami to Thailand via intermediates in Central and South America, the Society and Fiji Islands, New Zealand, Australia, Indonesia, and Singapore. (2) Eight mainland coterminals to Hawaii (Hilo and Honolulu) and beyond (a) to Australia via Japan, Ryukyu Islands, Taiwan, Hong Kong, the Philippines, South Viet Nam, Thailand, Singapore, and Indonesia, and (b) to Singapore via Society Islands and other points listed in (1).

* Included herein are timely filed applications which are the subject of motions to consolidate by carrier applicants.

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Continental Air Lines, Inc.

Docket 15836 (Amended) — Hawaii (Hilo and Honolulu) to West Coast intermediate points with segments beyond Los Angeles-Long Beach to Chicago and Houston via intermediates.

Docket 16616 (Amended) — Fourteen mainland coterminals (1) to (directly and via Hawaii (Hilo and Honolulu) and the Central Pacific) Japan, Korea, Okinawa, Taiwan, Philippines, Hong Kong, Viet Nam, Laos, Thailand, Malaysia and Singapore; (2) to Hawaii (Hilo and Honolulu), Society Islands, American Samoa, Fiji Islands, New Zealand, Australia, Indonesia, and Singapore.

Delta Air Lines, Inc.

Docket 17024 — San Diego, Los Angeles/Long Beach, and San Francisco/Oakland-Honolulu.

Docket 17025 — Same mainland coterminals as Docket 17024, to Manila via Honolulu, Japan, Korea and Hong Kong.

Docket 17133 — Nine mainland coterminals (and San Juan)— Honolulu.

Docket 17134 — Same coterminals as Docket 17133 to Manila via Honolulu, Japan, Korea and Hong Kong.

Eastern Air Lines, Inc.

Docket 16357 (Amendments 1, 2 & 3) — Fifteen mainland coterminals to Hawaii (Hilo and Honolulu) and beyond Hawaii (1) to Japan, Korea, Ryukyu Islands, Taiwan, Philippines, Hong Kong, and Thailand; (2) to Tahiti, Cook Islands, American Samoa, New Zealand, Australia, Indonesia, Singapore, Malaysia, Viet Nam, Thailand, Philippines, Hong Kong, Taiwan, Ryuku Islands, Korea and Japan. Extend Route 131, with Mexican points as intermediates, to Hawaii (Hilo and Honolulu) and beyond to Tahiti, Cook Islands, American Samoa, New Zealand, Australia, Indonesia, Singapore, Malaysia, Viet Nam, Thailand, Philip-

lines, and Hong Kong. Add Norton AFB and Travis AFB, California, and McChord AFB, Washington, as domestic coterminals.

The Flying Tiger Line Inc.

Docket 15830 (Amendment 1) — Points on domestic Route 100 as mainland coterminals to Thailand via Alaska (Cold Bay), Hawaii (Hilo and Honolulu) and the Central Pacific to Japan, Korea, Taiwan, Hong Kong, the Philippines, and Viet Nam (Property and mail only).

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Hawaiian Airlines, Inc.

Docket 17047 (Corrected) — Six specific routes, largely of an inter-island local service character, in the South, Central and Western Pacific. The routes provide for terminal points in Hawaii and the Western Pacific.

National Airlines, Inc.

Docket 17052 — California coterminals San Francisco/Oakland, Los Angeles/Long Beach, and San Diego to Hawaii (Hilo and Honolulu).

Docket 17053 — Same mainland coterminals as Docket 17052 to the Philippines via Hawaii (Hilo and Honolulu), Japan, Okinawa, Korea, Taiwan and Hong Kong.

Docket 17054 — Petitions for an investigation of possible interchange services in U.S.-Pacific area markets.

Northeast Airlines, Inc.

Docket 17041 — to Japan, Korea, Okinawa, Ryukyu Islands, Taiwan, Hong Kong, the Philippines, Australia and New Zealand from various combinations of some 22 mainland coterminal or intermediate points, on a direct route beyond Seattle and on a routing beyond the California gateways via Honolulu. Included is a route from 12 such coterminals and intermediates terminating beyond Seattle at Honolulu.

Northwest Airlines, Inc.

Docket 17039 — to Japan, Korea, Okinawa, Taiwan, Hong Kong, Philippines, Indonesia, Singapore, Malaysia, Viet Nam, Laos, and Thailand via Alaska (Anchorage) from 13 mainland coterminals.

Docket 17040 — to the same transpacific points from the same mainland coterminals as in Docket 17039 via Hawaii (Hilo and Honolulu) and Guam.

Pacific Air Lines, Inc.

Docket 17032 — Los Angeles and/or San Francisco-Hawaii.

Pacific Northern Airlines, Inc.

Docket 17023 — Anchorage-Honolulu; Seattle/Tacoma and Portland-Honolulu.

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Pan American World Airways, Inc.

Docket 15140 - Add Travis AFB, California, as a domestic coterminal on route 130.

Docket 15440 (Amendments 1 & 2) - Add to routes 117 and 130 (1) Hilo between the mainland and Honolulu, and (2) San Diego and various Eastern and Midwestern coterminals.

Docket 15559 (Amendments 1 & 2) - Amend certificate for route 130 so that present transpacific areas could be served from various Eastern and Midwestern mainland coterminals, as well as from existing West Coast gateways, via Alaska (Fairbanks). Add Korea, Okinawa and Taiwan and extend route 130 beyond India and Pakistan to Moscow, U.S.S.R.

Docket 17044 - Amend certificate for route 150 so as to authorize service to Fairbanks, Alaska from Eastern and Midwestern mainland coterminals, as well as from the existing points of Portland and Seattle/Tacoma.

In its applications Pan American generally seeks certificate descriptions of "terminal or intermediate points in Hawaii" in lieu of the present designation in its existing certificates of Honolulu as the sole Hawaiian terminal or intermediate point, as the case may be.

Seaboard World Airways, Inc.

Docket 17028 - Seattle, Anchorage and various additional Eastern and Midwestern mainland coterminals to Japan, Philippines, Hong Kong, Viet Nam, Malaysia, Singapore, Thailand, Burma, Okinawa, Taiwan, Korea, India, and Pakistan (property and mail only).

Slick Corporation, Inc.

Docket 14552 (Amended) - Six mainland coterminals to India via Hawaii, Wake Island, Guam, Japan, the Philippines, Hong Kong, Taiwan, Okinawa, Singapore and Thailand (property and mail only).

Trans World Airlines, Inc.

Docket 16974 (Amendment 1) - To Hong Kong via Taiwan and Japan (a) from the intermediate Honolulu and the terminals San Francisco and Los Angeles, and (b) from Los Angeles, San Francisco and Seattle. Alternative request for an extension of the carrier's transatlantic route 147 beyond Hong Kong across the Pacific to the West Coast.

[32]

Order E-23740

Appendix A
Page 5 of 5

United Air Lines, Inc.

Docket 17018 - Amend certificate for route 118 so as to provide two segments: (1) San Francisco and Los Angeles to Honolulu and beyond (a) to Thailand via Japan and Hong Kong, and (b) to New Zealand and Australia; (2) New York, Chicago and Seattle to Thailand via Japan and Hong Kong.

Docket 17019 - Amend certificate for route 1 so as to permit direct service from Hawaii (Hilo and Honolulu) to San Diego and to points on segments 5 and 6 of said route.

Western Air Lines, Inc.

Docket 17042 - Thirteen mainland coterminals to Hawaii (Hilo, Honolulu, Kahului and Lihue).

Docket 17043 - Same mainland coterminal points as in Docket 17042 to Thailand via Mexico, Hawaii (Hilo, Honolulu, Kahului and Lihue), Japan, Korea, Okinawa, Taiwan, the Philippines, Hong Kong, Singapore, Malaysia and Viet Nam.

World Airways, Inc.

Docket 17035 - Seattle and Portland to Japan and beyond Japan to China, the U.S.S.R., and Korea, Okinawa and Taiwan; and beyond Taiwan (a) to Hong Kong, and (b) to the Philippines. Oakland/San Francisco and Los Angeles (1) to Japan via Hawaii, and beyond Japan (a) to China, (b) to Singapore via Taiwan, Okinawa, Hong Kong, Viet Nam, and Thailand, and (c) to the U.S.S.R.; (2) to Hawaii, the Philippines, Hong Kong, Viet Nam, Thailand and Singapore; and (3) to Hawaii, Society Islands, American Samoa, New Zealand and Australia.

Docket 17036 - Oakland/San Francisco and Los Angeles via Hawaii to Okinawa with intermediate points including Wake, Midway, Johnston and Guam, and the United States Trust Territories of the Pacific Islands.

[33]

Order No. E-23741

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Issued under delegated authority
May 25, 1966

TRANSPACIFIC ROUTE INVESTIGATION :

Docket 16242

ORDER GRANTING AND DENYING INTERVENTION

To date some 70 petitions for leave to intervene in this proceeding have been filed. These include petitions of (1) air carriers which are not applicants for mainland-Pacific certificates, (2) cities and related civic groups which might stand to benefit by the grant of the applications of one or more carriers, (3) states and state governmental bodies, and (4) agencies, departments and instrumentalities of the United States. ^{1/}

The interests of many of the petitioners in this case are clear. Aloha Airlines, Inc. and Hawaiian Airlines, Inc., the two certificated Hawaiian air carriers, have an obvious competitive interest in the applications seeking new authority within Hawaii and between Hawaii and the mainland. Also involved are areas of concern within the purview of interested components of the United States government, as represented by the petitions of the Department of Commerce, the Department of Defense, and the Postmaster General. The same is generally true with respect to most of the states and subdivisions of state governments which are petitioners. The real questions relate to the numerous petitions by mainland cities and civic groups seeking status as formal parties.

By Order E-23740, dated May 25, 1966, the Board established the scope of this proceeding and included herein the applications of 19 carrier applicants. The Board determined, among other things, that it would hear applications for mainland-Pacific authority only to and from specified mainland cities which would be considered as potential coterminals

for any services that might be authorized. It is evident from the order that this approach was motivated by the Board's desire to give realistic consideration to possible present and future air service needs while, at

1/ Considered herein are petitions filed in response to applications which have been consolidated as well as those filed in this investigation itself. These include petitions of the State of Alaska, the City of Fairbanks, North Star Borough, and the Fairbanks Chamber of Commerce, Inc. (Dockets 15440, 15559 and 15140); the City of Ft. Worth and the Ft. Worth Chamber of Commerce (Dockets 16616, 16357, and 16832); and the City and Chamber of Commerce of Oklahoma City (Docket 16832).

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the same time, keeping the proceeding within reasonable bounds. The Board specifically found that failure to place such a limitation on the mainland cities to be considered "could produce a proceeding of unmanageable proportions and would seriously delay our reexamination of the transpacific route pattern, a matter which is deemed by the President and the Board to be one of high priority." 2/

The same general considerations should govern formal participation by mainland cities and their representatives in this proceeding. Even with such participation limited to those having a clear and direct interest in the outcome, the record to be developed will of necessity be large, complex, and time-consuming in preparation. Were other communities whose interests are more remote to be added, the cumulative net result would be a substantial burden upon the proceeding. Considering the magnitude of the issues, the need for expedition, and the varying nature and extent of the petitioners' interests, it is concluded that formal party status should be extended only to mainland cities (and related state and civic groups) which are being considered for designation as coterminals. 3/

No prejudice or injury should result to the petitioners in the civic category which are being denied formal party status. In view of the large number of applicants and the wide geographical distribution of the potential coterminals, their general interest in improved service for their particular areas can be adequately represented and developed by the

formal participants. The procedure of Rule 14 is, of course, available should they desire to tender particular evidence or written statements of position concerning the issues in the proceeding.

With such extensive state and civic representation as will be present here, evidence can tend to become unduly repetitious and cumulative unless affirmative measures are taken to prevent it. Civic and state parties are urged, as they will be at the prehearing conference, to join together wherever feasible and consolidate their evidentiary presentations. For the information and guidance of all concerned, attached as Appendix A is a copy of Section 399.61, which sets forth the Board's policy concerning the participation of public and civic bodies in route proceedings.

In addition to the various classes of petitioners heretofore discussed, the Allied Pilots Association has filed a petition for leave to intervene. The Association is the exclusive collective bargaining representative of some 2,000 pilots in the employ of American Airlines and it desires to intervene in support of American's application.

2/ Order E-23740, p. 3.

3/ This would include cities under consideration for possible hyphenation with designated coterminals.

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This proceeding has none of the aspects of a merger or acquisition proceeding in which issues of protective labor conditions are present but involves an assessment of service needs and selection of carrier questions. On the pertinent issues American, as an applicant, is fully capable of asserting and protecting its own interests, corporate and otherwise. Further, grant of the Association's petition no doubt would lead to similar requests from pilot or other groups representing employees of the other 18 carrier applicants, which could result in a procedural morass and serious delay in the processing of the proceeding. Under the circumstances, it is concluded that the Association's interest is not sufficiently separate and distinct from that of American itself to warrant formal intervention.

Pursuant to authority delegated by the Board in its Regulations 14 CFR 385.11, it is found that the petitioners listed in ordering paragraph 1 hereof have sufficient interest in this proceeding to justify their participation as parties, and that the interests of the petitioners listed in ordering paragraph 2 hereof are insufficient for this purpose.

ACCORDINGLY, IT IS ORDERED THAT:

1. The petitions for leave to intervene filed by the following petitioners are granted: Aloha Airlines, Inc. and Hawaiian Airlines, Inc; Department of Commerce, Department of Defense, and Postmaster General; State of Alaska; City of Boston and the Greater Boston Chamber of Commerce; Buffalo Area Chamber of Commerce; City of Chicago and the Chicago Association of Commerce and Industry; City of Dallas and the Dallas Chamber of Commerce; City and County of Denver and the Denver Chamber of Commerce; Detroit Aviation Commission and Board of County Road Commissioners of the County of Wayne, Michigan and Greater Detroit Board of Commerce (Detroit Parties); City of Fairbanks, North Star Borough, and the Fairbanks Chamber of Commerce, Inc; Territory of Guam; State of Hawaii; City and County of Honolulu and the Chamber of Commerce of Honolulu; City of Houston and the Houston Chamber of Commerce; City of Ft. Worth and the Ft. Worth Chamber of Commerce; Illinois' Department of Business and Economic Development and the Illinois' Department of Aeronautics; City of Kansas City, Missouri; Los Angeles Chamber of Commerce; Massachusetts Port Authority and the Commonwealth of Massachusetts, New England Council and New England Conference of State Aviation Officials; Metropolitan Washington Board of Trade; Michigan Aeronautics Commission; Minneapolis-St. Paul Metropolitan Airports Commission; City of New Orleans and the Chamber of Commerce of the New Orleans Area; City of New York, the New York Chamber of Commerce, New York Board of Trade, Inc., and the New York State Department of Commerce; Niagara Frontier Port Authority; Port of Oakland, California; Division of Aviation, Department of Commerce, Ohio; City of Philadelphia and the Chamber of Commerce of Greater Philadelphia; City of Phoenix, Arizona, and the Phoenix Chamber of Commerce; City of Portland, Portland Chamber of Commerce, Portland Freight Traffic Association, and the Port of Portland (Portland Parties); Public Utility Commission of Oregon; City

of San Diego, the San Diego Chamber of Commerce, the San Diego Unified Port District (San Diego Parties); City and County of San Francisco; City of St. Louis

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and the Chamber of Commerce of Metropolitan St. Louis; The State of Washington Utilities and Transportation Commission, the City of Seattle, the Seattle Chamber of Commerce, the City of Tacoma, the Tacoma Chamber of Commerce, the Board of King County Commissioners, the Port of Seattle Commission, and the Seattle Traffic Association (Washington Parties).

2. The petitions for leave to intervene filed by the following petitioners are denied: Albany Area Chamber of Commerce & Greater Troy Chamber of Commerce; Allied Pilots Association; Greater Cincinnati Chamber of Commerce; The City of Dayton and the Dayton Area Chamber of Commerce; Department of Aeronautics of the State of Connecticut; the City of Hartford; City of Knoxville, Tennessee, and the Greater Greater Knoxville Chamber of Commerce, Inc.; City of Little Rock, Little Rock Municipal Airport Commission, and the Little Rock Chamber of Commerce; Chamber of Commerce of Louisville, Kentucky; City of Memphis; Metropolitan Government of Nashville; City and Chamber of Commerce of Oklahoma City; Greater Providence Chamber of Commerce; the Rochester Chamber of Commerce; State of Rhode Island; The City of San Antonio, Texas, and the San Antonio Chamber of Commerce; City of San Jose, California; Schenectady County Chamber of Commerce, Inc.; The City of Syracuse and the Greater Syracuse Chamber of Commerce; the State of Tennessee; The Tucson Airport Authority; the City of Tulsa, Oklahoma, and the Tulsa Chamber of Commerce.

Persons entitled to petition the Board for review of this order pursuant to the Board's Regulations, 14 CFR 385.50, may file such petitions within ten days after the date of service of this order.

This order shall be effective and become the action of the Civil Aeronautics Board upon expiration of the above period unless before that date

a petition for review thereof is filed or the Board gives notice that it will review this order on its own motion.

Robert L. Park
Hearing Examiner
(SEAL)

HAROLD R. SANDERSON
Secretary

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Appendix A
Page 1 of 1

Section 399.61 Presentations of public and
civic bodies in route proceedings.

For the purpose of implementing the Board's policy to provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and otherwise to expedite route proceedings, and in light of experience, the following guidelines are hereby established:

(a) Public and civic bodies which represent the same geographic area or community should consolidate their presentation of evidence, briefs or oral argument to the examiner and the Board;

(b) A public body or a civic organization, or several such bodies or organizations whose presentation of evidence is consolidated, should keep to a minimum the number of witnesses used to present the factual evidence in support of the community's position;

(c) Exhibits offered in evidence by a public body or civic organization should be limited to evidence of the economic characteristics of the

community and area involved, data as to community of interest and traffic, evidence with respect to the sufficiency of existing service, and airport data, and should not include data relating to number of electricity, water and gas meters, telephones, schools, freight car loadings, building permits, sewer connections, or volume of bank deposits in the community.

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PETITION OF

THE CITY OF SAN ANTONIO, TEXAS,
AND
THE SAN ANTONIO CHAMBER OF COMMERCE

RECEIVED
DOCKET SECTION

JUN 6 3 29 PM '66

CIVIL AERONAUTICS
BOARD

FOR RECONSIDERATION OF CONSOLIDATION ORDER NO. E-23740

The City of San Antonio and the San Antonio Chamber of Commerce ("Petitioners") request the Board to reconsider its consolidation order in the above-entitled proceeding, and, on such reconsideration, to include San Antonio as a potential mainland terminal point. In support thereof petitioners respectfully show the following.

In the consolidation order the Board named certain "potential mainland points" to be considered. There are three Texas cities with sufficient interest in this case to file petitions for leave to intervene. The Board named two of these (Houston and Dallas) as points, but refused to name San Antonio as such a point. This appears to be an inadvertance, but, nevertheless, it results in a

discriminatory and prejudicial action against San Antonio. The Board named potential points because it desired to

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reduce the size of the case. While such a purpose may be laudable, it definitely operates to the prejudice of San Antonio. It is clear that some of the applicants are proposing new and improved services to San Antonio, but, by omitting San Antonio from the "potential" points to be served, the Board is creating an atmosphere, and, perhaps, a rule (which could be considered the law of the case) which would encourage the airline applicants to ignore San Antonio in their proposals in this case.

The Courts have long recognized that cities compete with cities. As the United States Court of Appeals for the District of Columbia said:

"Our American system of free enterprise tends to adjust many of these problems: good business management is prompt to supply service whenever and wherever demand appears. In regulated industries, this urge for expansion may be lessened or slowed down, but it still remains." 1/

It is because air transportation is a regulated industry that San Antonio should be included as a potential point for service.

This proceeding will probably fix the transpacific route pattern for the next decade.^{2/} The Federal Aviation Act provides for a public hearing on applications for new

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- 1/ Greensboro-High Point Air A. v. Civil Aeronautics Bd., 231 F 2d 517.
 - 2/ The last Transpacific case was instituted in 1959, seven years ago. Transpacific Route Case, 32 C.A.B. 928, 1080.

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routes, and recognizes the right of interested persons to participate in such hearing. Surely, the Board does not intend to say by its consolidation order that Houston and Dallas--but not San Antonio--may be considered and that Houston and Dallas--but not San Antonio--may be heard.^{3/}

In previous cases, San Antonio has been treated equally with Dallas and Houston. For example, in the Pacific Northwest-Southwest Service Investigation, docket 15459 et al., the Board named certain "Group IV" cities which included Dallas, Houston, San Antonio and New Orleans. In its present order, the Board names all of these cities--except San Antonio--as South and South Central points. There is no reason for the disparity of treatment between San Antonio in this proceeding as compared with other new route proceedings in which it has been accorded a parity of treatment with the cities with which it competes.

A very disturbing aspect of the Board's consolidation order is the naming of specific "potential" mainland points. This would appear to be a prejudgment with respect to points not named. If Houston and Dallas are

considered "potential" points, does this mean the Board considers San Antonio is not a potential point? Peti-

3/ This is the interpretation given to the consolidation order by the Examiner. (Order No. E-23741 in which he denies petitioners even the right to intervene.)

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tioners submit that the "potential" of San Antonio to constitute a mainland point is as great as that of Houston or Dallas. In any event, it does not appear that there is any adequate basis for the Board's decision. None of the data has been set forth in the order; and, certainly, it has not been subject to the test of analysis and cross-examination.

Raw and incomplete data with respect to population, geographical location, and overall traffic are not a suitable basis for the selection of mainland points. Community of interest and potential traffic are much more important. Usually such information is developed in a record; at a minimum the Board should have these data before it arbitrarily picks and chooses cities as potential points. Petitioners have been accorded no adequate opportunity to submit such data,^{4/} and submit that the Board should accord them such an opportunity before it makes final any selection of mainland points.

The consolidation order results in an incongruous situation. Phoenix is named as a potential point. Phoenix

has a 1960 metropolitan area population of 663,510; San Antonio's is 687,151. San Antonio's rate of growth in population exceeds that of Seattle, Portland, New Orleans,

4/ Obviously the ten days allowed for filing this petition for reconsideration is too short a time to prepare such data.

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Kansas City and St. Louis--all of which are named as "potential" points. It would seem that rate of growth, as well as total population, is a factor to be considered in selecting "potential" points for service, yet this factor appears to have been ignored.

San Antonio is a great military city. It is the center of the largest concentration in America of United States Army and United States Air Force installations. The Board indicates it will consider the needs for service at McChord Air Force Base in Washington, and Travis Air Force Base and Norton Air Force Base in California. The Board should give the same consideration to Fort Sam Houston, Lackland Air Force Base, Kelly Air Force Base, Randolph Air Force Base, and Brooks Air Force Base, all of which are at San Antonio.

Another factor which was apparently not considered is the area served by the airports of the various communities. The San Antonio airport is the only trunkline (jet) airport in Southwest Texas. The consolidation order

names Phoenix as a potential point because it is an air transportation hub in its particular region. San Antonio is just as much an air transportation hub in its large area of Southwest Texas.

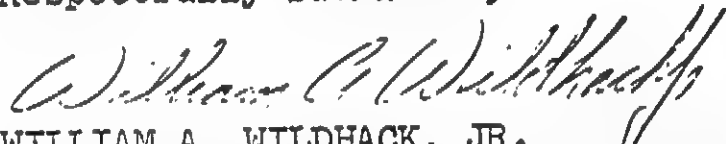
The consolidation order, if not amended, would constitute a prejudgment of the proceeding insofar as San

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Antonio is concerned. It indicates that the Board will not only not consider San Antonio as a potential point, but would not certificate service to San Antonio. When this indication is reviewed in the light of the order which names other Texas cities as potential points, it becomes clear that the order is a prejudgment insofar as San Antonio's case is concerned. It is not believed that the Board intended this, but the effect of the order is a prejudgment.

For the reasons above stated, petitioners request the Board to reconsider order No. E-23740, and, on such reconsideration, either eliminate all "potential mainland points" or add San Antonio as such a point in the South Central or Southwest area.

Respectfully submitted,


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June 6, 1966

Attorneys for the City of San
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Chamber of Commerce

CERTIFICATE OF SERVICE

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PETITION OF
THE CITY OF SAN ANTONIO, TEXAS,
AND
THE SAN ANTONIO CHAMBER OF COMMERCE
FOR REVIEW OF ORDER NO. E-23741

RECEIVED
DOCKET SECTION
JUN 6 3 28 PM '66
CIVIL AERONAUTICS
BOARD

By petition filed on April 26, 1966, the City of San Antonio and the San Antonio Chamber of Commerce ("Petitioners") duly filed a petition for leave to intervene in the above-entitled and numbered cause. By order No. E-23741 Examiner Robert L. Park denied the petition for leave to intervene. Petitioners request the Board to review the Examiner's action and, on such review, to grant petitioners' motion for leave to intervene, and, in support thereof, respectfully submit the following.

I. The Examiner's conclusion is contrary to law and Board precedent.

Petitioners have long been parties to the Transpacific Route Case, which is the predecessor of the instant proceeding. On May 13, 1963, by order No. E-19577, the Board--not an examiner--granted petitioners leave to

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intervene in the Transpacific Route Case, docket 7723, et al. The same allegations made then were made in the instant case. As the Board says, "the instant proceeding would

coincide generally in scope with the posture of the 'international phase' of the Transpacific Route Case" ... and "applications for new mainland-Hawaii authority will be at issue." Since the same issues are in the old and the new case, and since the Board granted petitioners leave to intervene in the old case, it is obvious that the Examiner's denial of intervention is contrary to Board precedent, and a clear case of res judicata.

Instead of simply reopening the record of the old Transpacific case, the Board instituted a new proceeding with substantially the same issues. If the old case had been reopened, petitioners would have been parties; a fortiori, petitioners should be parties to the new proceeding.

The Examiner apparently thought that because San Antonio was not named in the Board's order of consolidation as a potential mainland co-terminal point, it should not be granted leave to intervene.^{1/} If so, the Examiner is in error. In the original case, the Board named main-

^{1/} Petitioners are seeking reconsideration of the consolidation order. They believe the omission of San Antonio was inadvertent rather than deliberate and, in any event, San Antonio should and will be included as a mainland point.

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land points which did not include San Antonio and still granted leave to intervene. The Board's earlier order (E-19577) was issued on the same facts on the same issues and the Examiner's ruling is contrary to precedent and law.

II. A finding of a material fact is clearly erroneous.

The Examiner made a finding of material fact which is clearly erroneous. He finds no prejudice or injury should result to San Antonio because (1) the applicants can adequately represent San Antonio and (2) the procedure of Rule 14 is available. Neither of these assigned reasons supports the finding.

With regard to the first reason, no airline applicant can be expected to present the case which petitioners would present for San Antonio. The airline applicants do not have access to all of the data and information available to petitioners. Even if petitioners supplied these data to the airline, it would be necessary to call witnesses not connected with the airline to sponsor the exhibits and stand cross-examination. Some of these data will show that San Antonio has a greater need for a proposed service than other communities, and it is unreasonable to assume that an airline would support and favor one community over another. Consequently, the Examiner's finding that the applicants can adequately protect petitioners' interests is clearly erroneous.

With regard to the second reason assigned, i.e., Rule 14 procedures, the finding is equally erroneous. Under Rule 14, petitioners would not be able to make requests for evidence, participate in the formulation of issues, request subpoenas, or even have a right to cross-examine. They will not receive copies of the exhibits filed by the parties, and, without exhibits, would be hopelessly unable to file briefs or even assess the applicants' proposals. Moreover, Rule 14 does not authorize any written statements or oral arguments to the Board, unless the hearing is held by the Board. Here, the hearing will be held by the Examiner and petitioners would not, under Rule 14, be permitted to present oral argument. "The point is that in our jurisprudence an opportunity to present contentions orally, with whatever advantages that method of presentation has, is one of the rudiments of the fair play required when property is being taken or destroyed. There is an assurance that contentions will be heard and understood upon a verbal statement, a degree of certainty not secured by the mere filing of written material."^{2/}

Thus, petitioners' interests can only be adequately protected by permitting petitioners to intervene in the proceeding.

^{2/} Standard Air Lines, Inc. v. C.A.B., C.A.D.C. (1949), 177 F 2d 18.

III. The Examiner's order is substantially deficient on its face.

The Examiner has not found that petitioners do not have a substantial interest in this proceeding. Inasmuch as he granted leave to intervene to other communities, he could not find that San Antonio lacks a substantial interest in the proceeding. Service to San Antonio is proposed in applications included in this case. It is not known at this time exactly what new schedules and services will be proposed by the applicants but it is logical to infer that a carrier proposing service to a community will submit schedules in support of its case. However, petitioners' substantial interest cannot be denied just because proposed schedules have not yet been submitted.

The order is discriminatory. It grants leave to intervene to other communities with which San Antonio competes. Only three Texas cities sought to intervene in this case: Dallas, Houston and San Antonio. Houston and Dallas are granted leave to intervene: San Antonio is denied. This seems to be arbitrary and capricious on its face. A claim of competitive disadvantage is a claim recognized by the Courts.^{3/} Such a claim is likewise recognized by the Board, and the Board has long followed

^{3/} Greensboro-High Point Air. A. v. Civil Aeronautics Bd.,
C.A.D.C. 231 F 2d 517 (1956).

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the practice of permitting communities to intervene in route proceedings.^{4/} A departure from this established practice in this case would result in discrimination against San Antonio and prejudice it in its efforts to obtain new and improved air service.

The Examiner's order would deny petitioner due process of law. One reason assigned for the denial of the petition for leave to intervene is that there is a magnitude of issues and the record will be large and time-consuming in preparation. This is tantamount to saying, "I have to listen to so many other parties that I do not have time to listen to you." Surely, the Board cannot condone such cavalier treatment of a community. If time has to be spent in developing a complete record, it is an inherent fault of the administrative process. So long as there are rules of law which require hearings, those same rules of law require that affected persons be heard. It may be unfortunate that there are magnitudinous issues in this proceeding, but those are not of petitioners' making and petitioners should not be penalized therefor.

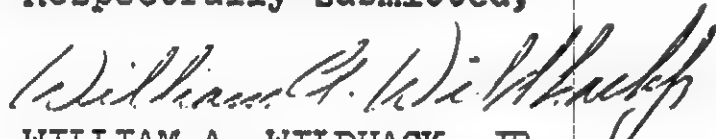
Because petitioners were allowed to intervene in the old Transpacific case, because they have a substan-

^{4/} In the Pacific Northwest-Southwest Service Case, Docket 15459, et al., Indianapolis, Melbourne, Orlando, Cincinnati, and Columbus were granted leave to intervene. All of these cities had less interest in that case than San Antonio has in this one.

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tial interest in the new case which cannot be adequately represented by existing parties, because the exclusion of San Antonio from the case would be arbitrary and capricious, it is requested that the Board review the Examiner's action, and, after such review, grant petitioners' petition for leave to intervene in this proceeding.

Respectfully submitted,



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June 6, 1966

Attorneys for the City of San
Antonio and the San Antonio
Chamber of Commerce

CERTIFICATE OF SERVICE

Dated: June 10, 1966

PETITION OF THE
STATE OF WISCONSIN
FOR LEAVE TO INTERVENE

COMES NOW the State of Wisconsin in its sovereign capacity by Bronson C. La Follette, its Attorney General, and George B. Schwahn, Assistant Attorney General, pursuant to the request of the Wisconsin State Aeronautics Commission and at the direction and authorization of Warren P. Knowles, Governor of the State of Wisconsin, and respectfully states as follows:

1. Petitioner is one of the sovereign states of the United States of America.

2. The State of Wisconsin has a substantial interest in this matter and hereby respectfully petitions for leave to intervene. Its interest and grounds for intervention are as follows:

a. The State has declared by statute (Sec. 114.01, Wis. Stats.) that it be the policy of the State to cooperate with the Government of the United States in the preparation of an annual revision of its plan for a nationwide system of public airports as provided by an Act of Congress approved May 13, 1946, as amended, being Public Law 377, commonly referred to as the Federal Airport Act. The State has created the Wisconsin State Aeronautics Commission, a statutory body or agency, to which it has confided the general

supervision of aeronautics in the State and the duty of promoting and fostering a sound development of aviation in the State in cooperation with any federal aeronautical agency;

b. General Mitchell Field, Milwaukee, Wisconsin, is the major airport in the Wisconsin airport system and it benefits and serves the entire state;

c. On May 25, 1966, by Order No. E-23740, the Board denied consolidation of applications that would have included Milwaukee as a co-terminal on Pacific routes (e.g., United's application in Docket No. 17019), despite the fact that by the several standards employed in selecting co-terminals, Milwaukee should have been included as a co-terminal. Milwaukee is the 11th largest city in the United States, larger than fifteen cities included by the Board as potential co-terminals (App., p. 1), and its rank among the nation's cities is increasing (App., pp. 2, 3). Milwaukee is the 16th largest metropolitan area in the United States (App., p. 4), and ranks 16th in effective buying income, larger than ten points

included as potential co-terminals in this case (App., p. 5). Milwaukee's historic traffic to the Pacific area is greater than that of other cities included as potential co-terminals in this case (App., p. 6). As long ago as 1958, prior to the last Trans-Pacific Case, Milwaukee enjoyed one-carrier, direct connecting service to the Pacific (OAG, North American Edition, March, 1958, pp. 510 and 511);

d. By Order No. E-23741, also dated May 25, 1966, the Board acted on pending petitions to intervene, determining that formal party status would be granted to the applicants for intervention only to the extent that the communities involved were named as potential co-terminals in the concurrent order. Milwaukee is currently an intermediate point on Northwest's Route 3 which enables Northwest to offer one-carrier, one-plane service to points in the Orient and Pacific on Northwest's Routes 95 and 129;

e. Milwaukee is currently an intermediate point on United's Route 1 which enables United to offer one-carrier, single-plane service to

Hawaii on its Route 118. Despite Milwaukee's existing status on routes permitting single carrier, single-plane service to the Pacific, Milwaukee was not included among the points named as potential co-terminals in this case. Wisconsin, by motion, will ask the Board to include Milwaukee as a potential mainland co-terminal point in this proceeding;

f. Nevertheless, under the circumstances that have developed in this case, Wisconsin's interest in service presently authorized at Milwaukee may be jeopardized in this case; and Wisconsin will be unable to press its interest in expanded one-carrier, single-plane service to points in the Pacific involved in this case, unless Wisconsin is permitted formal intervention in the proceeding. The interests of the nearest proposed co-terminal, Chicago, are adverse to that of Wisconsin and Milwaukee because of surface distance, airport and air traffic congestion, and costs;

g. Furthermore, the Board by Order E-14428, dated September 4, 1959, granted the State of Wisconsin's request to intervene in Docket No. 7723, et al;

h. The State of Wisconsin has a substantial interest in the strengthening and improving of scheduled airline service at Milwaukee and other points in Wisconsin. The Board's action in connection with this matter will directly affect present and future air service at Milwaukee and other points in Wisconsin. Thus, the final determination in this proceeding will be of substantial interest to the State of Wisconsin.

3. Petitioner avers that its interest will not be adequately represented by any person or party in this matter, that the intervention hereby requested will not unduly broaden the issues, and that the petitioner's interest entitles it to be made a party to the above entitled matter under the Federal Aviation Act of 1958, as amended, and the Rules of Procedure promulgated pursuant thereto.

WHEREFORE, the petitioner, State of Wisconsin, prays that it be granted leave to intervene and become a party to the above captioned matter, with the right to receive notice of and appear at all conferences or hearings, to produce evidence and offer same into the record, to produce, examine and cross examine witnesses, to be heard upon brief and at oral argument,

if oral argument is granted, and otherwise participate in all respects of the proceedings.

Dated at Madison, Wisconsin, this 10th day of June, 1966.

Respectfully submitted,

BRONSON C. LA FOLLETTE
Attorney General

C.A.B. Docket No. 16242

Appendix
Page 1 of 6

MILWAUKEE IS THE NATION'S 11TH LARGEST CITY

15 Cities That Are Smaller than Milwaukee
Are Included in the Case

<u>Metro Area</u>	<u>1960 Population (000)</u>	<u>... Metro Area</u>	<u>1960 Population (000)</u>
1. New York*	7,782.0	23. Denver*	493.9
2. Chicago*	3,550.4	24. Atlanta*	487.5
3. Los Angeles*	2,479.0	25. Minneapolis*	482.9
4. Philadelphia*	2,002.5	26. Indianapolis	476.3
5. Detroit*	1,670.1	27. Kansas City, Mo.*	475.5
6. Baltimore*	939.0	28. Cleveland, O.	471.3
7. Houston*	938.2	29. Phoenix*	493.2
8. Cleveland*	876.0	30. Newark	405.2
9. Washington*	764.0	31. Louisville	390.6
10. St. Louis*	750.0	32. Portland, Ore.*	372.7
11. MILWAUKEE	741.3	33. Oakland	367.5
12. San Francisco*	740.3	34. Fort Worth	356.3
13. Boston*	697.2	35. Long Beach	344.2
14. Dallas*	679.7	36. Birmingham	340.9

15. New Orleans*	627.5	37. Oklahoma City	324.3
16. Pittsburgh*	604.3	38. Rochester, N. Y.	318.6
17. San Antonio	587.7	39. Toledo	318.0
18. San Diego*	573.2	40. St. Paul	313.4
19. Seattle*	557.1	41. Norfolk	304.9
20. Buffalo*	532.8	42. Omaha	301.6
21. Cincinnati	502.6	43. Honolulu	294.2
22. Memphis	497.5	44. Miami*	291.7

* Potential mainland co-terminal points.

Source: Bureau of the Census, Statistical Abstract of the United States, 1965.

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Appendix
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MILWAUKEE'S INCREASING RANK AMONG
THE NATION'S LARGER CITIES

1950		1960	
<u>City</u>	<u>Population</u> (000)	<u>City</u>	<u>Population</u> (000)
1. New York*	7,892.0	New York*	7,782.0
2. Chicago*	3,621.0	Chicago*	3,550.4
3. Philadelphia*	2,071.6	Los Angeles*	2,479.0
4. Los Angeles*	1,970.4	Philadelphia*	2,002.5
5. Detroit*	1,849.6	Detroit*	1,670.1
6. Baltimore*	949.7	Baltimore*	939.0
7. <u>Cleveland*</u>	<u>914.6</u>	Houston*	938.2
		<u>Cleveland*</u>	<u>876.0</u>

8. St. Louis*	856.8		
9. Washington*	802.2	Washington*	764.0
10. Boston*	801.4	St. Louis*	750.0
11. San Francisco	775.4	MILWAUKEE	741.3
12. Pittsburgh*	676.8	San Francisco*	740.3
13. MILWAUKEE	637.4	Boston*	697.2
14. Houston*	596.2	Dallas*	679.7
15. Buffalo*	580.1	New Orleans*	627.5
16. New Orleans*	570.4	Pittsburgh*	604.3
17. Minneapolis*	521.7	San Antonio	587.7
18. Cincinnati	504.0	San Diego*	573.2
19. Seattle*	467.6	Seattle*	557.1
20. Kansas City*	456.6	Buffalo*	532.8
21. Newark	438.8	Cincinnati	502.6
22. Dallas*	434.5	Memphis	497.5
23. Indianapolis	427.2	Denver*	493.9
24. Denver*	415.8	Atlanta*	487.5
25. San Antonio	408.4	Minneapolis*	482.9
26. Memphis	396.0	Indianapolis	476.3
27. Oakland	384.6	Kansas City, Mo.*	475.5
28. Columbus, O.	375.9	Columbus, O.	471.3
29. Portland, Ore.*	373.6	Phoenix*	439.2
30. Louisville	369.1	Newark	405.2

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1950		1960	
<u>City</u>	<u>Population</u> (000)	<u>City</u>	<u>Population</u> (000)
31. San Diego*	334.4	Louisville	390.6
32. Rochester, N.Y.	332.5	Portland, Ore.*	372.7
33. Atlanta*	331.3	Oakland	367.5
34. Birmingham	326.0	Fort Worth	356.3
35. St. Paul	311.3	Long Beach	344.2
36. Toledo	303.6	Birmingham	340.9
37. Jersey City	299.0	Oklahoma City	324.3
38. Fort Worth	278.8	Rochester, N.Y.	318.6
39. Akron	274.6	Toledo	318.0
40. Omaha	251.1	St. Paul	313.4
41. Long Beach	250.8	Norfolk	304.9
42. Miami*	249.3	Omaha	301.6
43. Providence	248.7	Honolulu	294.2
44. Dayton	243.9	Miami*	291.7
98. Phoenix*	106.8	Kansas City, Kans.	129.6

*Potential mainland co-terminal points.

Source: Bureau of the Census, Statistical Abstract of the United States, 1965.

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Appendix
Page 4 of 6MILWAUKEE IS THE NATION'S 16TH LARGEST METRO AREA10 Metro Areas That Are Smaller than Milwaukee
Are Included in the Case

<u>Metro Area</u>	<u>1960 Population (000)</u>	<u>Metro Area</u>	<u>1960 Population (000)</u>
1. New York (Standard Consolidated Area)*	14,759.4	20. San Diego*	1,033.0
2. Chicago (Standard Consolidated Area)*	6,794.5	21. Atlanta*	1,017.2
3. Los Angeles*	6,038.8	22. Miami*	935.0
4. Philadelphia*	4,342.9	23. Denver*	929.4
5. Detroit*	3,762.4	24. Indianapolis	916.9
6. San Francisco*	2,648.8	25. New Orleans*	907.1
7. Boston*	2,959.5	26. Portland, Ore.*	821.9
8. Pittsburgh*	2,405.4	27. Providence	821.1
9. St. Louis*	2,104.7	28. San Bernadino	809.8
10. Washington*	2,001.9	29. Tampa	772.5
11. Cleveland*	1,909.5	30. Columbus, O.	754.9
12. Baltimore*	1,727.0	31. Rochester, N.Y.	732.6
13. Minneapolis*	1,482.0	32. Dayton	727.1
14. Buffalo*	1,307.0	33. Louisville	725.1
15. Houston*	1,243.2	34. San Antonio	716.2
16. MILWAUKEE	1,232.7	35. Anaheim	703.9
17. Seattle*	1,107.2	36. Memphis	674.6
18. Kansas City*	1,092.5	37. Phoenix*	663.5
19. Dallas*	1,083.6		

* Potential mainland co-terminal points.

Source: Bureau of the Census, Statistical Abstract of the United States, 1965.

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Appendix
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INCOME AMONG ALL THE NATION'S METRO AREAS, 196410 Metro Areas That Are Smaller Than Milwaukee
Are Included in the Case

<u>Metro Area</u>	<u>Effective Buying Income (000,000)</u>	<u>Metro Area</u>	<u>Effective Buying Income (000,000)</u>
1. New York (Standard Consolidated Area)*	\$44,802	21. San Diego*	2,996
2. Chicago (Standard Consolidated Area)*	20,713	22. Denver*	2,800
3. Los Angeles*	20,097	23. Atlanta*	2,719
4. Philadelphia*	11,581	24. Anaheim	2,643
5. Detroit*	10,195	25. Miami*	2,554
6. San Francisco*	8,703	26. Indianapolis	2,490
7. Boston*	8,636	27. Bridgeport, Conn.	2,400
8. Washington*	7,016	28. Hartford	2,272
9. St. Louis*	5,679	29. San Jose	2,235
10. Pittsburgh*	5,634	30. San Bernardino	2,209
11. Cleveland*	5,274	31. Portland, Ore.*	2,204
12. Baltimore*	4,462	32. Rochester, N.Y.	2,153
13. Minneapolis*	4,169	33. Columbus, O.	2,025
14. Houston*	3,652	34. New Orleans*	2,016
15. Buffalo*	3,462	35. Sacramento	1,898
16. MILWAUKEE	3,454	36. Dayton	1,897
17. Cincinnati	3,303	37. New Haven	1,884
18. Seattle*	3,217	38. Providence	1,853
19. Dallas*	3,158	39. Phoenix*	1,826
20. Kansas City*	3,152		

* Potential mainland co-terminal points.

Source: Sales Management, Survey of Buying Power, June 10, 1965.

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**THREE CITIES SELECTED AS POTENTIAL TRANS-PACIFIC
TERMINALS HAD FEWER INTERNATIONAL AIR
PASSENGERS IN 1964 THAN MILWAUKEE**

1964 International Passengers Carried by U.S. and/or Foreign Flag Carriers

<u>City</u>	<u>Number</u>	<u>Rank Among Cities in 48 States</u>
New York*	1,835,904	1
Los Angeles*	520,416	2
San Francisco*	391,704	3
Miami*	390,242	4
Boston*	248,048	5
Chicago*	243,452	6
Seattle*	242,476	7
Washington*	189,298	8
Philadelphia*	178,262	9
Detroit*	98,602	10
Baltimore*	72,990	11
Portland*	69,486	12
Minneapolis*	68,360	13
Houston*	65,172	14
Cleveland*	61,778	15
Pittsburgh*	57,442	16
New Orleans*	49,280	17
Dallas*	47,580	18
Denver*	38,798	19
St. Louis*	37,904	20
Hartford*	37,724	21
San Antonio	35,944	22
Tampa	34,456	23
San Diego*	33,944	24
Buffalo*	33,534	25
MILWAUKEE	28,024	26
Kansas City*	26,296	27
Atlanta*	26,466	28
Cincinnati	23,174	29
Salt Lake City	20,486	30
Syracuse	19,538	31
Indianapolis	18,814	32
Las Vegas	18,772	33
Rochester	18,376	34
Phoenix*	18,234	35

* Potential Mainland Co-terminal Points

Source: Civil Aeronautics Board, International Origin-Destination Survey of U.S. Flag Airline Passenger Traffic, March and September 1964; International Origin-Destination Survey of Passenger Journeys via U.S. Domestic/Foreign Flag Airlines, January-June and July-December, 1964.

UNITED STATES OF AMERICA)
)
 STATE OF WISCONSIN) ss
)
 COUNTY OF DANE)

Thomas K. Jordan, being first duly sworn on oath,
 deposes and says:

1. That he is the director of the Wisconsin State Aeronautics Commission, and is duly authorized to make this verification for and on petitioner's behalf;

2. That he has read the foregoing petition, knows the contents thereof, and that the facts stated therein are true to the best of his knowledge, information, and belief; and

3. That the reason this verification is made by affiant and not by petitioner is that said petitioner is a sovereign state of the United States, capable of acting only through an agent.

Thomas K. Jordan /s/
 THOMAS K. JORDAN

Subscribed and sworn to before
 me this 10th day of June, 1966.

George B. Schwahn /s/
 Notary Public, State of Wisconsin
 My Commission is permanent.

C E R T I F I C A T E O F S E R V I C E

It is hereby certified that a copy of the foregoing petition of the State of Wisconsin has this day been served upon the following via United States mail properly addressed and postage prepaid:

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Dated at Madison, Wisconsin, this 10th day of June, 1966.

/s/George B. Schwahn

GEORGE B. SCHWAHN
Assistant Attorney General

MOTION OF THE CITY OF TAMPA, FLORIDA
THE COUNTY OF HILLSBOROUGH, FLORIDA AND
THE GREATER TAMPA CHAMBER OF COMMERCE
THAT LATE-FILED PETITION FOR RECONSIDERATION OF ORDER
NO. 23740 OF THE CIVIL AERONAUTICS BOARD BE RECEIVED

The City of Tampa, Florida, the County of Hillsborough, Florida and the Greater Tampa Chamber of Commerce (Tampa) hereby moves that its Petition for Reconsideration of Civil Aeronautics Board Order No. E-23740 be received by the Examiner and be duly considered as though timely filed.

Tampa has not in the past and does not now find it financially feasible to retain Washington counsel nor, for that matter, a "watching service" to keep it currently posted on developments reflected in Civil Aeronautics Board proceedings. While Tampa does its best, the above conditions considered, to keep abreast of current proceedings by the Civil Aeronautics Board, it nevertheless happens that on occasion matters of substantial interest to Tampa do not come to our attention on a timely basis.

Such has been the case with respect to the preliminary orders of the Examiner and the Board in Civil Aeronautics Board Docket 16242, Transpacific Route Investigation. As a result of this situation, we have not participated in the deliberations which resulted in excluding Tampa as a so-called mainland point for

consideration for service to and from the transpacific points involved in this Case.

The attached Petition for Reconsideration of the Board's Order No. E-23740 contains, we believe, excellent grounds for including Tampa as a mainland point. The facts and circumstances set forth in that Petition should come to the attention of the Board.

WHEREFORE, Tampa prays that the Examiner will accept the attached Petition for Reconsideration and give to it the same attention and consideration as though it were timely filed.

Respectfully submitted,

City of Tampa, Florida
Nick C. Nuccio, Mayor

County of Hillsborough, Florida
Rudy Rodriguez, Chairman
Board of County Commissioners

Greater Tampa Chamber of Commerce
Michel G. Emmanuel, President

By _____

Charles W. Loe, Jr., Manager
Dept. of Traffic & Transportation
Greater Tampa Chamber of Commerce
P. O. Box 420
Tampa, Florida 33601

June 13, 1966

CERTIFICATE OF SERVICE

* * *

PETITION FOR RECONSIDERATION OF THE
CITY OF TAMPA, FLORIDA
COUNTY OF HILLSBOROUGH, FLORIDA
AND THE
GREATER TAMPA CHAMBER OF COMMERCE

Come now the City of Tampa, Florida, the County of Hillsborough, Florida and the Greater Tampa Chamber of Commerce and respectfully petition the Examiner and the Civil Aeronautics Board to reconsider Civil Aeronautics Board Order No. E-23740 to the extent that it does not name Tampa as one of the mainland points to be considered for transpacific service.

The Tampa-St. Petersburg Metropolitan Area is one of the fastest growing areas in the United States, both from the standpoint of population and air traffic generation. The population has more than doubled since 1950--growing from 409,143 in that year to over 1,000,000 in 1966. Adjoining counties which contribute substantially to air travel swell the total population in the immediate traffic generating area to well in excess of 1½ million people.

Traffic handled at Tampa International Airport, historically the hub of commercial aviation on Florida's West Coast--is currently growing at the rate of approximately 25 per cent per

year. On May 15, for instance, the two millionth passenger to pass through the Airport within the previous twelfth month period was honored in an appropriate ceremony. It is apparent that this rate of increase will continue and it is respectfully submitted that air travelers in such numbers should be accorded the privilege of boarding at their own airport, rather than having to rely upon an airport hundreds of miles away for transpacific travel.

The Tampa area is rapidly going forward as a tourist and convention center. A \$6,000,000 convention hall was completed just a year ago and as a result Tampa is getting into the "big time" as a convention city. Tampa's Busch Gardens is already the largest tourist attraction in the point of numbers and visitors in the State of Florida. Last year 2,100,000 persons registered at Busch Gardens and in the first four months of 1966, over 1,000,000 registered guests were entertained, indicating that the volume this year will reach 3,000,000. Advertising and publicity programs concerning numerous other attractions in the area are continuing to attract visitors in ever increasing numbers.

Tampa is an important industrial and commercial distribution center, supplying a wholesale trade area with a population in excess of 3,000,000 persons. Tampa contributes substantially to the defense and space exploration programs through its industrial production and commercial distribution.

On June 10, 1966, the first of several contracts was let to

begin construction on Tampa's new and ultra-modern air terminal complex. The new terminal embodies a revolutionary concept which attracted architects and engineers from many foreign cities which are contemplating new terminals. This new terminal, which will limit the passengers walking distance between automobile and airplane to a maximum of 600 feet, will be the most modern and efficient air terminal in the World when it is completed early in 1969. Thus, Tampa is meeting head-on the magnificent challenge of air travel for the future.

WHEREFORE, Tampa prays (1) that the Examiner and the Board reconsider its Order No. E-23740 dated May 25, 1966 to the extent that Tampa, Florida be named as one of the mainland terminals named on Pages 2 and 3 of that Order; or (2) in the alternative, Tampa be named as a co-terminal point with Miami and/or such other mainland points as the Board may see fit to include in a co-terminal grouping.

Respectfully submitted,

City of Tampa, Florida
Nick C. Nuccio, Mayor

County of Hillsborough, Florida
Rudy Rodriguez, Chairman
Board of County Commissioners

Greater Tampa Chamber of Commerce
Michel G. Emmanuel, President

June 13, 1966

by

CERTIFICATE OF SERVICE

Charles W. Loe, Jr., Manager
Dept. of Traffic & Transportation
Greater Tampa Chamber of Commerce
P. O. Box 420
Tampa, Florida 33601

PETITION OF THE
CITY OF TAMPA, FLORIDA
COUNTY OF HILLSBOROUGH, FLORIDA
AND THE
GREATER TAMPA CHAMBER OF COMMERCE
FOR LEAVE TO INTERVENE

* * * * *

To the Civil Aeronautics Board:

Come now your petitioners, the City of Tampa, Florida; the County of Hillsborough, Florida and the Greater Tampa Chamber of Commerce and respectfully represent that they have a vital interest in the matter referred to in the above entitled proceeding and desire to intervene in and become parties to said proceeding and for grounds of the proposed intervention say:

1. Petitioner City of Tampa, Florida is a municipal corporation organized and existing under the laws of the State of Florida.

2. Petitioner County of Hillsborough, Florida is a political sub-division organized and existing under the laws of the State of Florida.

3. Petitioner Greater Tampa Chamber of Commerce is a corporation organized and existing under the laws of the State of Florida which is dedicated to the promotion of the transportation,

business, industrial and commercial interests of the City of Tampa and its surrounding area; and it is authorized to represent the aviation interests of its members.

4. Petitioners are all served through Tampa International Airport.

5. Petitioners are constantly working for additional and improved air routes and schedules between Tampa and major cities in the World.

6. Petitioner City of Tampa has for many years been an outstanding foreign trade center with a marine port that is the highest ranking port in terms of tonnage between Mobile, Alabama and Norfolk, Virginia. During 1965, over 18,000,000 tons of cargo were attracted through the port. Additional and improved international air service from the Tampa Bay area is essential to the continued growth of sea borne commerce.

7. Tampa, because of its central location, is the logical international air gateway for some 3 million Floridians.

8. Petitioners' Airport--Tampa International--is presently handling some 2 million passengers a year. It is capable of accommodating the largest commercial jet airliners and a \$44 million dollar expansion program, soon to be under way, will make it one of the most modern air terminals anywhere in the World. The Airport has complete U. S. Customs, Immigration and Public Health Service facilities. The Airport now provides adequate runways and other

facilities for handling over-ocean flights, and is one of the few airports in the United States being considered for use in the SST program.

9. The petitioners are presently engaged in other proceedings which will provide Tampa with International service.

10. Petitioners have a vital interest in the above proceeding which will not and cannot be adequately represented by the existing parties and the intervention of the petitioners will not unduly expand nor enlarge the scope of the proceeding.

WHEREFORE, the City of Tampa, Florida; the County of Hillsborough, Florida and the Greater Tampa Chamber of Commerce pray leave to intervene in the above entitled proceeding with the right to appear at hearing and at oral argument and to receive notice of all matters involved in this proceeding.

Respectfully submitted,

City of Tampa, Florida
Nick C. Nuccio, Mayor

County of Hillsborough, Florida
Rudy Rodriguez, Chairman
Board of County Commissioners

Greater Tampa Chamber of Commerce
Michel G. Emmanuel, President

June 20, 1966

CERTIFICATE OF SERVICE

* * *

By _____

Charles W. Loe, Jr., Manager
Dept. of Traffic & Transportation
Greater Tampa Chamber of Commerce
P. O. Box 420
Tampa, Florida 33601

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UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

TRANSPACIFIC ROUTE INVESTIGATION

DOCKET 16242

REPORT OF PREHEARING CONFERENCE

Served:

1 JUL 1966

Upon:

CARRIER APPLICANTS

Jerome Kuykendall, 1815 H Street, N.W., Washington, D. C. 20006,
for Alaska Airlines, Inc.
Alfred V. J. Prather, 1707 L Street, N. W., Washington, D. C.
20036, for American Airlines, Inc.
B. Howell Hill, 1229 - 19th Street, N.W., Washington, D. C. 20036,
for Braniff Airways, Inc.
Lee M. Hydeman, 1001 Connecticut Avenue, N.W., Washington, D. C.
20036, for Continental Air Lines, Inc.
Robert Reed Gray, 1001 Connecticut Avenue, N.W., Washington, D. C.
20036, for Delta Air Lines, Inc.
James F. Bell, 1001 Connecticut Avenue, N.W., Washington, D. C.
20036, for Eastern Air Lines, Inc.
Robert M. Hausman, One Farragut Square South, Washington, D. C.
20006, for the Flying Tiger Line, Inc.
Andrew T. A. MacDonald, 729 - 15th Street, N.W., Washington, D. C.
20005, for National Airlines, Inc.
Clarence I. Peterson, 1625 Eye Street, N.W., Washington, D. C.
20006, for Northeast Airlines, Inc.
Robert N. Duggan, Klagsbrunn & Hanes, 710 Ring Building, Washington,
D. C. 20036, for Northwest Airlines, Inc.
Frederick A. Ballard, 912 American Security Building, Washington,
D. C. 20005, for Pacific Air Lines, Inc.
Gerald P. O'Grady, O'Grady & Reiber, 1625 Eye Street, N.W., Washington,
D. C. 20006, for Pacific Northern Airlines, Inc.
William E. Miller, Steptoe & Johnson, 1250 Connecticut Avenue, N.W.,
Washington, D. C. 20036, for Pan American World Airways, Inc.
Joseph H. Sharlitt, 1522 K Street, N.W., Washington, D. C. 20005,
for Seaboard World Airlines, Inc.

(Continued)

Exceptions, if any, to matters contained herein must be filed with
the Docket Section, Civil Aeronautics Board, Washington, D. C. 20428,
and served upon all parties within five days of the date of service
shown above.

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Lipman Redman, 815 Connecticut Avenue, N.W., Washington, D. C. 20006, for the Slick Corporation, Inc. & Airlift International, Inc.
Edmund E. Harvey, 25 Broadway, New York, N.Y. 10004, for Trans World Airlines, Inc.
Howard C. Westwood, 701 Union Trust Building, Washington, D. C. 20005, for Western Air Lines, Inc.
James Francis Reilly, 1625 K Street, N.W., Washington, D. C. 20006, for United Air Lines, Inc.
Jerrold Scoutt, Jr., 1104 Brawner Building, Washington, D. C. 20006, for World Airways, Inc.

CIVIC AND STATE

Warren C. Colver, Attorney General of Alaska, Capitol Building, Fairbanks, Alaska, for State of Alaska. 99801
Arthur C. Coffey, Corporation Counsel, 11 Beacon Street, Boston, Massachusetts 02108, for the City of Boston.
William F. Chouinard, Director of Transportation and Community Development, 125 High Street, Boston, Massachusetts 02110, for the Greater Boston Chamber of Commerce.
Edward T. Brick, Director, Transportation Department, 238 Main Street, Buffalo, New York 14202, for the Buffalo Area Chamber of Commerce.
James E. Strunck, Assistant Corporation Counsel, City Hall, Chicago Illinois 60602, for the City of Chicago.
Gerald E. Franzen, 30 West Monroe Street, Chicago, Illinois, 60603, for the Chicago Association of Commerce and Industry.
N. Alex Bickley, 501 Municipal Building, Dallas, Texas 75201, for the City of Dallas, and the Dallas Chamber of Commerce.
Tedford Dees, 353 City and County Building, Denver, Colorado 80202, for the City and County of Denver and the Denver Chamber of Commerce.
George C. Yiba, 150 Michigan Avenue, Detroit, Michigan 48226, for the Greater Detroit Board of Commerce.
Dennis A. Campbell, 7th Floor, City-County Building, Detroit, Michigan 48226, for the Board of County Road Commissioners of the County of Wayne, Michigan.
Harold Hood, 1010 City-County Building, Detroit, Michigan 48226, for the City of Detroit Aviation Commission.
Barry W. Jackson, 527 Fourth Avenue, Fairbanks, Alaska 99701, for the City of Fairbanks, North Star Borough, & the Fairbanks Chamber of Commerce.
Edward A. McDermott, Hogan & Hartson, 815 Connecticut Avenue, N.W., Washington, D. C. 20006, for the Territory of Guam.
Bert T. Kobayashi, Attorney General, Iolani Palace Grounds, Honolulu, Hawaii 96813, for the State of Hawaii.

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Neal S. Blaisdell, Mayor, Honolulu, Hawaii, for the City and County of Honolulu.
C. J. Cavanagh, Executive Vice President, Dillingham Building, Honolulu, Hawaii 96813, for the Chamber of Commerce of Honolulu.
Cecil A. Beasley, Jr., 912 American Security Building, Washington, D. C. 20005, for the City and Chamber of Commerce of Houston, Texas.

S. G. Johndroe, Jr., City Attorney, 1000 Throckmorton Street, Fort Worth, Texas 76102, for the City of Fort Worth and the Fort Worth Chamber of Commerce.

Richard W. Jamison, Room 1722, 160 North LaSalle Street, Chicago, Illinois 60601, for the Illinois Department of Business and Economic Development.

Jack E. Wenzel, Jr., Capitol Airport, Springfield, Illinois 62705, for the Illinois' Department of Aeronautics.

Dorothy F. Fardon, Associate City Counselor, 2800 City Hall, Kansas City, Missouri 64106, for the City of Kansas City.

Vincent A. Bordelon, Manager, Washington, Office, for the Los Angeles Chamber of Commerce.

Neil L. Lynch, 141 Milk Street, Boston, Massachusetts 02109, for the Massachusetts Port Authority.

Crocker Snow, Director, Massachusetts Aeronautics Commission, Boston-Logan Airport, East Boston, Massachusetts 02128, for the Commonwealth of Massachusetts, New England Council, and New England Conference of State Aviation.

William H. Press, 1616 K Street, N. W., Washington, D. C., for the Metropolitan Washington Board of Trade.

Joseph B. Bilitzke, Assistant Attorney General, Capitol Building, Lansing, Michigan 48902, for the Michigan Aeronautics Commission.

Albert F. Beitel, 905 American Security Building, Washington, D. C. 20005, for the Minneapolis-St. Paul Metropolitan Airports Commission.

Alvin J. Liska, City Attorney's Office, City Hall, New Orleans, Louisiana 70112, for the City of New Orleans.

Douglas W. McIlhenry, P.O. Box 30240, New Orleans, Louisiana 70130, for the Chamber of Commerce of the New Orleans Area.

J. Lee Rankin, Municipal Building, New York, New York 10007, for the City of New York

Woodson D. Scott, 25 Broadway, New York, New York 10004, for the New York Chamber of Commerce.

Neil H. Anderson, Executive Vice President, One Liberty Street, New York, New York 10005, for the New York Board of Trade, Inc.

J. Bruce MacDonald, 112 State Street, Albany, New York 12203, for the New York State Department of Commerce.

James E. Kelly, General Counsel, 1700 City Hall, Buffalo, New York 14202, for the Niagara Frontier Port Authority.

J. Kerwin Rooney, Port Attorney, 66 Jack London Square, Oakland, California 94607, on behalf of the Port of Oakland and the Oakland Chamber of Commerce.

Robert D. Macklin, Assistant Attorney General, State House Annex, Columbus, Ohio 43215, for the Division of Aviation, Department of Commerce, State of Ohio.

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Herbert Smolen, Assistant City Solicitor, 1520 Municipal Services Building, Philadelphia, Pennsylvania 19107, for the City of Philadelphia.

George E. Pratt, Attorney, Executive Director, Traffic and Transportation Council, 121 South Broad Street, Philadelphia, Pennsylvania 19107, for the Chamber of Commerce of Greater Philadelphia.

Andy Baumert, 251 West Washington Street, Phoenix, Arizona 85003, for the City of Phoenix, and the Phoenix Chamber of Commerce.

Lofton L. Tatum, 1310 Yeon Building, Portland, Oregon 97240, for

the City of Portland, Port of Portland, Chamber of Commerce, and Freight Traffic Association.

Thomas Higashi, Assistant Attorney General, 193 Public Service Building, Salem, Oregon 97310, for the Public Utility Commission of Oregon.

Edwin L. Miller, City Attorney's Office, City Administration Building, San Diego, California 92101, for the City of San Diego.

Edgar J. Langhofer, 499 West Broadway, San Diego, California 92101, for the San Diego Chamber of Commerce.

Aaron W. Reese, Port Attorney, Port of San Diego, P.O. Box 488, San Diego, California 92112, for the San Diego Unified Port District.

Thomas M. O'Connor, City Attorney, City Hall, San Francisco, California 94102, for the City and County of San Francisco.

Thomas McGuire, City Counselor, 234 City Hall, St. Louis, Missouri 63103, for the City of St. Louis.

A. P. Kaufmann, 224 North Broadway, St. Louis, Missouri 63102, for the Chamber of Commerce of St. Louis.

Frank P. Hayes, Assistant Attorney General, Temple of Justice, Olympia, Washington, 98501, for the Washington Utilities and Transportation Commission, City of Seattle, City of Tacoma, Seattle Chamber of Commerce, Tacoma Chamber of Commerce, Board of King County Commissioners, Seattle Traffic Association, (Washington Parties).

CARRIER INTERVENORS

Harry A. Bowen, Room 603, Jefferson Building, 1225 - 19th Street, N.W., Washington, D. C. 20036, for Aloha Airlines, Inc.

James M. Verner, Verner, Lipfert & Bernhard, Suite 1035, Universal Building, North, 1875 Connecticut Avenue, N.W., Washington, D. C. 20009, for Hawaiian Airlines, Inc.

OTHERS

William J. Driscoll, 5516 Department of Commerce Building, Washington, D. C. 20230, for the Department of Commerce.

Col. Eugene B. Sisk, Scott Air Force Base, Illinois, 62226, for the Department of Defense.

Thomas J. L. L. L. L., Room 4226, Post Office Department, Washington, D. C. 20260, for the Postmaster General.

James Lawrence Smith, Civil Aeronautics Board, Washington, D. C. 20428, for the Bureau of Operating Rights.

TRANSPACIFIC ROUTE INVESTIGATION

DOCKET 16242

REPORT OF PREHEARING CONFERENCE HELD JUNE 15-16, 1966

In accordance with the notice of the undersigned Examiner dated May 25, 1966, a prehearing conference in the above-entitled proceeding was held on June 15-16, 1966. The following appearances were entered:

Harry Bowen for Aloha Airlines, Inc.
Jerome Kuykendall for Alaska Airlines, Inc.
Alfred V. J. Prather and Ky P. Ewing for American Airlines, Inc.
William D. Rogers, John T. Rigby and B. Howell Hill for Braniff Airways, Inc.
Lee M. Hydeman and C. Edward Leasure for Continental Air Lines, Inc.
Robert Reed Gray and Morris Shipley for Delta Air Lines, Inc.
James Bell for Eastern Air Lines, Inc.
Robert M. Hausman for the Flying Tiger Line, Inc.
James M. Verner and Michael C. Roberts for Hawaiian Airlines, Inc.
Andrew MacDonald for National Airlines, Inc.
Clarence I. Peterson for Northeast Airlines, Inc.
Robert N. Duggan for Northwest Airlines, Inc.
Frederick A. Ballard and V. Rock Grundman for Pacific Air Lines, Inc.
Gerald P. O'Grady for Pacific Northern Airlines, Inc.
Elihu Schott for Pan American World Airways, Inc.
Joseph H. Sharlitt for Seaboard World Airlines, Inc.
Lipman Redman and John Law Elliott for the Slick Corporation, Inc.
Edmund E. Harvey and Warren E. Baker for Trans World Airlines, Inc.
Howard C. Westwood and William H. Allen for Western Air Lines, Inc.
Floyd M. Rett, Henry L. Hill, James F. Reilly and E.F. McKeown, Jr.,
for United Air Lines, Inc.
Jerrold Scoutt for World Airways, Inc.
Lipman Redman for Airlift International, Inc.
James Lawrence Smith for the Bureau of Operating Rights
Theodore I. Seamon for Wien Alaska Airlines, Inc.
William J. Driscoll and Daniel F. O'Keefe for the Department of Commerce
Eugene B. Sisk and Lt. Col. Donnelly for the Department of Defense
Thomas F. Meagher and Jerry P. McKinnon for the Postmaster General
Frank A. Rhuland, Jr. for the Department of the Interior

Cecil A. Beasley and Joseph A. Foster for Houston
Edwin L. Miller for the City of San Diego
Aaron W. Reese for San Diego Unified Port District
Lofton L. Tatum for the City of Portland
Thomas Higashi for the State of Oregon

J. Kenneth Rooney for Port of Oakland and Oakland Chamber of Commerce
Tedford Dees for the City and County of Denver and the Denver Chamber of Commerce
Dorothy E. Fardon and Harbord C. Hoffman for the City of Kansas City
Woodson D. Scott for the New York Chamber of Commerce
Douglas W. McInerney for the Chamber of Commerce of the New Orleans Area
Alvin J. Liska for the City of New Orleans
Edgar J. Langhofer for the San Diego Chamber of Commerce
James L. Highsaw for the Master Executive Council of Pan American Pilots
Stephen L. Colband for Virginia Airports Authority and Fairfax County Industrial Development Authority
Joel H. Fisher, Frank P. Hayes and H. Ernest Franklin for the Washington Parties
Theodore I. Seamon for the City of San Jose
Barry W. Jackson for the Fairbanks Parties
Thomas McGuffee and Paul S. Jemenway for the City of St. Louis
A. P. Kaufman and R. C. Marquart for the St. Louis Metropolitan Chamber of Commerce
J. Bruce McDermott and T. Lynch for the New York State Department of Commerce
William H. Price and Charles C. Coon for the Metropolitan Washington Board of Trade
Stoney Colestar, Francis A. Mulhern and Richard R. Zinser for the Port of New York Authority
J. Lee Backus and Samuel Mandell for the City of New York
James E. Struck for the City of Chicago
Orville E. Franken for the Chicago Association of Commerce
Richard Jamison and Gene Graves for the Illinois Department of Business and Economic Development
Edmond C. LaFollette and George B. Schwahn for the State of Wisconsin
Andy Balmert for the City of Phoenix and Phoenix Chamber of Commerce
Frederick A. Ballard for the City of Baltimore and the Baltimore Parties
H. Hooley for the Cleveland Chamber of Commerce
A. V. Blanka and Andrew H. Brown for the City of Cleveland
Vernon A. Bridgion for the Los Angeles Chamber of Commerce
Joseph B. Blittzke and James D. Ramsey for the Michigan Aeronautics Commission and the State of Michigan
Jack E. Wintel for the State of Illinois
William A. Wildhack for the City of San Antonio and the San Antonio Chamber of Commerce

Albert F. Beitel for the Minneapolis-St. Paul Metropolitan Airports Commission
Kenneth P. Tubbs and N. Alex Bickley for the City of Dallas and the Dallas Chamber of Commerce
S. G. Johndroe for the City of Fort Worth
Jack Key for the Fort Worth Chamber of Commerce
George C. Kiba for the Greater Detroit Board of Commerce
Donald A. Campbell for the Wayne County Road Commission
Harold Hood for the City of Detroit Aviation Commission
Edward A. McDermott and Neal E. Sheldon for the Territory of Guam

Bert T. Kobayashi for the State of Hawaii
Roger C. Wolf for the Secretary of the Interior
William Boucher, III for the Greater Baltimore Committee
J. Cookman Boyd, Jr. for the Chamber of Commerce of Metropolitan
Baltimore
E. Dent Lackey for the City of Niagara Falls, New York

The Proceeding. This investigation is concerned with an examination of the pattern of operations by United States air carriers in the Pacific. In general, included within the proceeding are proposals involving air service between the United States mainland, on the one hand, and Hawaii and other areas of the Pacific to be served directly or through Hawaii, on the other hand.

The Issues. By Order E-23740, dated May 25, 1966, the Board fixed the scope of the proceeding and determined the applications to be heard. Subject to any changes or modifications that may be made by the Board as the result of the pending petitions requesting reconsideration of Order E-23740, the issues for decision are those raised by that order.

The Examiner stated that for the purposes of the conference it would be assumed that the Board would make no change in the scope of the issues as established by its prior order. The conference proceeded on this basis. Should the Board ultimately grant one or more of the pending petitions, consideration will be given at that time to what, if any, changes are necessary with respect to the matters determined at the conference.

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There was some discussion of the issues as they relate to all-cargo flights operated by combination carriers. The question of whether such authorizations for combination air carriers are required by the public convenience and necessity is at issue, since the Board consolidated both the property and passenger portions of their applications. There is, however, no issue in this proceeding of restricting or reducing the right of presently

certificated combination carriers to transport property across the Pacific, in either combination or all cargo aircraft, under their existing authorizations.

The Stipulations. In addition to the material specified in Rule 24(m) of the Board's Rules of Practice, the following will be stipulated at the request of the party indicated:

1. Eastern: (a) Reports of the Hawaiian Visitors Bureau (Annual and Monthly Reports); (b) United Nations Statistical Yearbook; and (c) United Nations Demographic Yearbook.

2. Dallas: (a) Monthly, semi-annual, and annual reports of international and overseas travel, as published by the Immigration and Naturalization Service, United States Department of Justice; (b) The Stateman's Yearbook, latest edition; (c) Waterborne Commerce of the United States, as published annually by the Corps of Engineers, U.S. Army; and (d) Yearbook of National Accounts Statistics, Yearbook of International Trade Statistics, and Monthly Bulletin of Statistics, all as published by the United Nations.

Parties wishing to rely on bilateral agreements and related exchanges of notes which are not publicly available will reproduce them. Action on the proposal of the Bureau of Operating Rights (Bureau) that the Federal Aviation Agency's forthcoming report setting forth the economic model approved for the

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super-sonic transport development be noted officially was reserved pending publication of the report.

Requests for Evidence. The requests for evidence of the Bureau, previously circulated to all parties, were extensively discussed. Subject to the revisions made as the result of the conference discussion, they were accepted as the basic information requests for this proceeding and will be complied with by all parties concerned to the best of their abilities.

The Bureau's requests, as amended by the Examiner to reflect the determinations made at the conference, are set forth in Appendix A. Substantial and significant additions, modifications, and deletions have been underscored. In addition, the attention of the parties is invited to the following:

1. Northwest, Pan American, United are to provide information concerning the maximum structural capacity of cargo bins in their combination aircraft.
2. Yields are to be provided on a passenger mile basis, in the categories of mainland-Hawaii and all other Pacific services.
3. To the extent feasible, Pan American will provide for a representative period on a sampling basis data concerning the routing used by its on-line traffic, i.e., North Pacific and Central Pacific; and
4. Although 1970 has been established as the forecast year, the parties are free to submit additional forecasts predicated on other future periods should they desire to do so.

00

As indicated in its submission prior to prehearing conference, the Bureau has undertaken to provide some basic information exhibits for the convenience of all parties. ^{1/} These exhibits will be served on the parties on or before July 29, 1966. All other responses to information requests will be served on or before July 25, 1966.

San Diego requested of both Pan American and United for a future sample period a tabulation of reservations on Los Angeles departures to Hawaii and beyond by persons giving a San Diego address or phone number. This request was left as a matter for further discussion between the parties. The same

disposition was made of the request of Dallas for data on a survey or sample basis concerning the mainland point of origin (and for passengers originating at inland points, the mode of transportation utilized to reach the gateway) of passengers outbound from West Coast gateways on U.S. flag carriers for transpacific destinations

Houston requested the Department of Commerce to provide information concerning the results of a questionnaire distributed on a sampling basis to residents returning from trips abroad and to visitors to the United States. Counsel for the Department agreed to investigate the matter to determine whether any such data could be provided.

1/ These will include the following: (1) historical passenger traffic from the International Origin-Destination survey of U.S.-Flag Airline Passenger Traffic and from the International Origin-Destination Survey of Passenger Journeys via U.S. Domestic/Foreign-Flag Airlines (Calendar year 1965 for the markets at issue); (2) historical passenger data from the Immigration and Naturalization Service's Report of Passenger Travel Between the United States and Foreign Countries (Calendar year 1965 for the markets at issue); (3) historical passenger traffic from International Civil Aviation Organization's (ICAO) traffic flow reports; and (4) airport to airport nonstop mileages for all major markets at issue based on the "great circle" distances.

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The Washington Parties requested the Department of Defense to supply data as to commercial and charter movements of military personnel and cargo to and from the transpacific areas involved in this case, by domestic gateway points of origination and destination. The Department agreed to provide data of this general character for both military and civilian traffic, on an annual basis, for the most current year and for a representative past period.

Pan American requested that each applicant which participated in the carriage of cargo moving between the mainland and Hawaii and between the mainland and transpacific areas in issue furnish true origin and destination data for all such cargo carried by it in the months of March, June, September

and December, 1965. The parties will provide such information to the extent that it is available. ^{2/}

The Examiner declined to require that any information concerning capacity limitations, restrictions, etc. imposed by foreign governments be produced in responses to information requests. Such matters are appropriate for the direct presentations of the Bureau and the carriers affected. Counsel for Northwest stated that at the hearing it will offer evidence of this character with the request that it be received in executive session.

Uniform Format for Exhibits. The Bureau's suggested uniform format for information responses and exhibits was discussed at length, both at the conference and in an informal meeting following the conference.

^{2/} The information requested by Pan American in Items 1 and 7 of Appendix A to its letter of March 2, 1966, will be included in the Bureau's information exhibits.

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By letter of June 21, 1966, the Bureau revised the original proposal in accordance with the understandings reached and has recirculated it to all parties. Carrier applicants are urged to follow the format as revised, and those who feel they cannot comply with it in full should at least utilize the major classifications of subject matter in numbering exhibits falling within the designated categories. As noted in the Bureau's letter, civic parties should use the 900 series for their exhibits, and they have the further option of utilizing the more detailed system if they desire to do so. ^{3/}

Ground Rules. The customary ground rules will govern the conduct of this proceeding and are reproduced as Appendix B.

Service of Pleadings and Exhibits. At the request of the conference

participants, the Examiner is attaching as Appendix C a list showing the requests of the parties concerning the number and service of copies of information responses, exhibits and other pleadings. In the absence of specification by a particular party, service should be made in accordance with the service list at the beginning of this report.

Procedural Dates. After discussion, the Examiner established the following procedural schedule:


Information Responses. July 25, 1966
Bureau's Information Exhibits. July 29, 1966
Direct Exhibits. October 10, 1966

3/ Since the revised uniform format has been served on all parties it has not been physically reproduced as part of this prehearing conference report. However, copies are on file with the official docket copies of this report.

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Rebuttal Exhibits. December 16, 1966
Written Testimony. December 30, 1966
Hearing. January 11, 1967

The question of possible field hearings was discussed but no decision was reached. Persons desiring a field hearing who had not previously made their position known were given a period of one week within which to submit such a request. This matter will be the subject of a later notice by the Examiner to all parties.


Robert L. Park
Hearing Examiner

Attachments

June 22, 1966

BUREAU'S REQUEST FOR EVIDENCEAppendix A
Page 1 of 8I. Historical Data -- All Carriers Whose Authority is In Issue. 1/

Each carrier whose authority is in issue is requested to submit:

A. For the months of March, June, September, and December, 1965,
a summary, by type of equipment used, and for each route segment at issue
and presently operated in scheduled services.

- (1) Number of flights
- (2) [Deleted]
- (3) The available seats by class 2/
- (4) Number of revenue passengers carried by class 2/
- (5) The revenue passenger load factors
- (6) The available tons
- (7) The tons of revenue freight 2/
- (8) The tons of mail carried, 2/ and
- (9) The overall load factor.

B. A tabulation for the year ended December 31, 1965 showing the
number of nonscheduled revenue flights, between points involved in this
investigation, the number of trips made and the traffic carried for each
pair of points by each aircraft type. These data should be broken down
between passengers and cargo and shown separately for military and civilian
operations.

1/ This item applies to all carriers conducting scheduled or non-scheduled
operations in the Pacific area and is to be supplied as a response to
information requests.

2/ For information of a continuing nature beyond 1965 concerning data in
these categories, parties will rely on the Air Transport Reporting
Forms (Traffic Flow), Form C, filed by the carriers with ICAO.

C. For the year ended December 31, 1965, complete coupon origin and destination of passengers for all scheduled services between points in issue in this proceeding; need not be shown by direction or by class of service. Coupon origin and destination is intended to reflect each on-line segment for which a coupon was issued. 3/

D. For each market in issue during the year ended December 31, 1965, the volume of U.S. Government travel listed separately for (1) individually ticketed, (2) charter (passenger and cargo), and (3) freight traffic.

II. Future Data 4/

Bureau Counsel requests that, in connection with each proposal to be prosecuted in this proceeding, each combination carrier applicant submit the following information in the form of exhibits with fully explanatory statements:

1. The form of the certificate sought, indicating in particular:
 - A. The linear route description.
 - B. The terms, conditions and limitations suggested.
2. The number and type of additional aircraft which will be required if the proposed plan of operation is put into effect. This would include the carrier's plans to purchase the so called "Stretch Jets" such as the DC-8 Super 61. Further, the Bureau would also want to know the carrier's plans for purchase of the so called "Jumbo Jets" such as the Boeing 747 and the DC-10. The carrier applicants planning to purchase this type of aircraft

3/ This information may be supplied either on a coupon or on-line origination and destination basis. In either case, it shall be accompanied by a full and complete explanation of the terminology and basis used by the carrier.

4/ To be supplied in direct exhibits unless otherwise indicated.

would be expected to explain the effect this aircraft would have on traffic generation as well as the fares to be charged over the various transpacific markets at issue.

3. The changes, if any, contemplated in the present fare structure on a market-by-market basis, including special fares.

4. For the future year ending December 31, 1970, submit:

A. Proposed schedules within the area of this proceeding, if the requested authorization is granted and if it is denied. 5/

Show seasonal variations, if any.

B. Submit estimates of the items listed below based on schedules in 4A above for the future year ending December 31, 1970.

These estimates should be submitted with sufficient explanatory detail to show the bases for the estimates and to permit reconstruction of the estimates from the basic data. The estimates should be broken down for each type of service to be operated, i.e., first-class, coach or combination first-class coach.

The estimates should also provide for a breakdown of the revenues and passengers derived from the military by category

(A & Z) transported on scheduled commercial flights.

(a) Plane-miles scheduled by equipment type.

(b) Revenue plane-miles flown by equipment type.
Revenue departures flown by equipment type.

(c) Revenue block-hours by equipment type

5/ Existing transpacific carriers are to respond to the hypothesis of denial to the extent feasible for them to do so. This item is not concerned with purely domestic service over domestic segments.

- (d) Available seat-miles.
- (e) Number of revenue passengers by class of service. ~~(This item should be provided on an ex-line origination and destination basis showing both local and connecting traffic)~~ 6/
- (f) Revenue passenger-miles.
- (g) Available ton-miles.
- (h) Revenue ton-miles of mail, express and freight.
- (i) Revenue derived from traffic in (e) and (h), specifying the revenue applicable to each class of traffic.

5. Show what portion of the estimated traffic and revenue represents new traffic and revenue generated by improvements in service, that which is being presently carried directly or by connection by the applicant carrier, and that traffic and revenue diverted from available routings or other presently certificated carriers. All traffic estimates should be shown in detail and should include a complete and detailed explanation of the methods used in arriving at these estimates. If any of the foregoing estimates are based on studies conducted independently by an applicant carrier it is requested that such studies be included as exhibit material.

6. Furnish, by C.A.B. control accounts, an estimate of the operating expenses to be incurred if the proposed services as shown in (4) be operated for the year ending December 31, 1970. Such cost estimates should be shown on a fully allocated basis. If the parties desire to use an added cost basis they may, of course, do so in addition to the method requested above. All estimates of costs must be accompanied by sufficient detail and explanation so as to permit reconstruction of the estimates from basic data.

6/ See Fn. 3 supra, which is also applicable to this item. Class of service may be shown on a general percentage basis.

7. Describe in detail the number of additional employees by class of employee which the proposed service will entail during the year ending December 31, 1970. 7/

8. Furnish an estimate of the additional property units (other than that shown in response to item 2), if any, which will be required if the proposed service is authorized. 7/

9. Estimate the pre-operating expenses which will be incurred if the proposed service is authorized. 8/

10. Describe in full the plans for obtaining additional capital, if any is required, for the proposed operation. 8/

11. Air carrier parties are requested to submit estimates of diversion on the assumption that the route changes proposed by the applicants will be in effect for the year ending December 31, 1970. Any party claiming diversion should provide estimates thereof specifying pairs of points or areas involved, the volume of traffic and the amount of revenue estimated to be diverted annually between all points or areas. Show basis for such estimates. 9/

12. All Cargo Service

A. Tentative schedules for future year ending December 31, 1970, covering the proposed markets by flight number, number of days per week to be operated and type of equipment to be utilized.

7/ May be shown in broad general terms without detail.

8/ Not applicable to presently operating transpacific carriers.

9/ To be supplied in rebuttal exhibits.

- B. Submit estimates of the following items based on the schedules shown in response to 12-A above, in sufficient detail to permit reconstruction of the estimates from the basic data:
- (a) Plane-miles scheduled by equipment type
 - (b) Revenue plane-miles flown by equipment type
Revenue departures flown by equipment type
 - (c) Revenue block-hours by equipment type
 - (d) Available ton-miles flown
 - (e) Revenue ton-miles of mail, express and freight on a point-to-point basis
 - (f) Cargo revenue including estimated yields by class of cargo.
- C. Furnish, by CAB control accounts, an estimate of the operating expenses to be incurred, based on proposed services, for the year ending December 31, 1970. Such cost estimates should be shown on a fully allocated basis. All estimates of costs must be accompanied by sufficient detail and explanation so as to permit reconstruction of the estimates from basic data.
- D. If feasible, show percentage of total volume of cargo to be carried on all-cargo flights which is "outsized" cargo (viz., cargo that could not move on combination aircraft serving route). Describe basis for conclusion reached.

13. From Civic Parties

In addition to pertinent economic data, it is requested that all civic party participants provide information regarding the need for air service between their city and points in the Pacific and Asia and any other evidence to show why the various applicant's requests should be granted. Civic parties

are reminded not to submit data relating to number of electricity, water and gas meters, telephones, schools, freight car loadings, building permits, sewer connections, or volume of bank deposits in the community as prescribed by Part 399.61 of the Board's Policy Statements (14 CFR 399.61).

SUPPLEMENTAL REQUEST FOR EVIDENCE

1. Civic parties, such as the State of Hawaii, Territory of Guam and the presently certificated carriers to the extent they are able to supply it, are to make available the following data separately for all Pacific and Asian cities at issue in this proceeding:

(a) For each year ended December 31, from 1961 through 1965, the total number of hotels, hotel rooms^{10/} and total guest capacity available to the general public.

(b) For 1(a) above the occupancy rate for each year requested.

(c) The number of hotels, rooms in each and total guest capacity presently under construction.

(d) The number of hotels, rooms in each and total guest capacity to be built during the years 1966 through 1970 (state expected date of completion for each hotel).

(e) A listing of existing tourist attractions such as golf courses, beaches, etc.

(f) A listing of new tourist ~~attractions~~ scheduled for completion during the period April 1, 1966, through December 31, 1970.

^{10/} The term "hotel rooms" is intended to include any type of room rented to the general public whether in a motel, guest house, apartment, etc.

(g) A summary of room rates over the period January 1, 1961 through December 31, 1965.

(h) Current room rates and rates expected to be charged during the years 1966 through 1970.

(i) For the years 1965 through 1970, budgets to promote tourism.

(j) A listing of organization, public and private, established to promote tourism.

2. Arrangements, if any, the carrier applicants have to coordinate through a single computer system, simultaneous reservations not only for airline space but also reservations for such items as ground tours, hotel rooms, car rentals, etc.

3. The Bureau requests that the Post Office Department supply the following data concerning the markets at issue in this proceeding:

(a) For the year ended December 31, 1965, a summary, by either pounds or tons, of the mail tendered to air carriers at existing gateways showing the true O&D routings and broken down by class of mail such as priority, non-priority, foreign, etc. Also, data showing normal growth over the preceding five year period.

(b) [Deleted]

4. [Deleted]

5. [Incorporated in II, Item 2]

1. Evidence. All evidence, including the testimony of witnesses, shall be prepared in written exhibit form and shall be served at dates designated by the Examiner in advance of the hearing. Evidence as to

events occurring after the exhibit-exchange dates shall be presented by a revision of exhibits.^{1/}

Witnesses cognizant of the exhibits shall be made available for cross-examination. However, witnesses will not be permitted to read prepared testimony into the record.

The evidentiary record shall be limited to factual material. Argument will not be received in evidence but rather should be presented in the briefs.

2. Exhibits. Information responses and exhibits shall be exchanged on prescribed dates prior to the hearing. Two copies shall be sent to each party and one to the Examiner;^{2/} provided, however, that civic and state interests need not serve exhibits on other cities and states or on air carriers which have not applied for service to such city or state unless specifically requested by the party interested, and air carriers need not serve exhibits upon cities and states not included within their applications unless specifically requested to do so. In the event that additional copies are desired, requests therefor should be made directly to the parties concerned.

^{1/} It is recognized that evidence from a party's witness who is or may become hostile cannot be reduced to writing.

^{2/} This should not be confused with the requirement for filing an original and 19 copies of formal papers such as motions, applications, etc.

The exhibits shall include appropriate footnotes or narrative explaining the source of the information used and the methods employed in statistical compilations and estimates. In the case of rebuttal exhibits they shall refer specifically to the exhibits being rebutted. Each party

shall submit a list of its exhibits appropriately indexed as to number and title prior to the hearing. Where one part of the multi-page exhibit is based upon another part, appropriate cross-reference shall be made. For example, a profit-and-loss forecast based on detailed estimates appearing on other pages should contain specific reference showing which pages support the different individual items of the forecast. Such exhibits shall be arranged in an organized manner in accordance with the party's theory of the case.

All exhibits shall comply with the requirements of Rule 3(b) of the Board's Rules of Practice as to form.

3. Title. The principal title of each exhibit should state precisely what it contains and may also contain a statement of the purpose for which the exhibit is offered. However, such statements will not be considered as part of the evidentiary record.

4. Authenticity. The authenticity of all documents submitted as proposed exhibits in advance of the hearing shall be deemed admitted unless written objection thereto is filed prior to the hearing, except that a party will be permitted to challenge such authenticity at a later time upon a clear showing of good cause for failure to have filed such written objection (e.g., absent objection, if an exhibit purporting to be a copy of a letter mailed on a certain date were submitted, it would not be necessary to prove such mailing or the accuracy of the copy).

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HEARINGAppendix B
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5. Order of Presentation. The order of presentation will be as follows, alphabetically as to each category:

(1) City and State interests

- (2) U.S. Government departments and agencies
- (3) Applicants
- (4) Other parties (except Bureau Counsel)
- (5) Bureau Counsel

Each party shall develop the hearing record on direct examination in logical order. Rebuttal shall be presented at the same time as the direct case.

If field hearings are held, procedures will be developed for informing all concerned of the presentations to be heard at a particular session.

6. Requirement for Submission of Corrected Copies of Exhibits. Each party shall present at the hearing three fully corrected copies of its exhibits received in evidence, two for the docket and one for the Examiner.

7. Cross-Examination. Cross-examination shall be limited to the scope of the direct examination and, except for Bureau Counsel, to witnesses whose testimony is adverse to the party desiring to cross-examine -- this being intended specifically to prohibit so-called "friendly cross-examination."

Except with the express permission of the examiner, second rounds of cross-examination will not be presented. Cross-examination of any particular witness shall be limited to one attorney for each party.

8. Motions. Oral presentation on any motion or objection shall be limited to the party or parties making the motion or objection and the party or parties against which the motion or objection is directed. Such presentations shall also be limited to one attorney for each party.

9. Offer of Exhibits in Evidence. The exhibits sponsored by each witness shall be offered in evidence at the close of his direct examination for ruling by the examiner prior to cross-examination. .

10. Official Notice and Stipulation. The material stipulated is that set forth in Rule 24(m) of the Board's Rules of Practice in Economic Proceedings (Section 302.24(m)) and the additional material noted in the body of the Prehearing Conference Report.

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<u>A. Carrier Applicants</u>		<u>Service List for Pleadings and Exhibits</u>			
<u>Party</u>		<u>Copies Requested</u>	<u>Service Copies</u>	<u>Additional Copies Requested</u>	
Alaska Airlines, Inc.	2	(1) Charles F. Willis, Jr President & General Manager Alaska Airlines, Inc Seattle-Tacoma International Airport Seattle, Washington 98158			
		(1) Shanley, Fisher & Kuykendall Attorneys for Alaska Airlines. Inc. 1815 H Street, N.W. Washington, D. C. 20006			
American Airlines, Inc.	4	(1) Alfred V.J. Prather, Esq. Prather, Levenberg & Seeger 1707 L Street, N. W. Washington, D. C. 20036		(1) Alfred V.J. Prather, Esq.	
		(1) Mr. Robert E. Kimble Director-Route Development American Airlines, Inc. 633 Third Avenue New York, New York 10017		(1) Mr. Robert E. Kimble	

Appendix C
Page 1 of 11

<u>Party</u>	<u>Copies Requested</u>	<u>Service Copies</u>	<u>Additional Copies Requested</u>
Braniff Airways, Inc	3	(1) Mr. T.P. Robertson Vice President-Economic Planning Braniff Airways, Inc. P.O. Box 35001 Dallas, Texas 75235	(1) Mr. T.P. Robertson
		(1) Mr. B. Howell Hill Arnold & Porter 1229 - 19th Street, N.W. Washington, D. C. 20036	
Continental Air Lines, Inc.	4	(1) Lee M. Hydeman, Esq. 1001 Connecticut Avenue, N. W. Washington, D. C. (1) Mr. Sam B. Redmond Vice President-Regulatory Proceedings Continental Air Lines, Inc. Los Angeles International Airport Los Angeles, California	(1) Mr. Sam B. Redmond (1) Mr. Franz Wolff Robert Nathan Associates 1218-16th Street, N.W. Washington, D. C.
Delta Air Lines, Inc.	4	(1) James W. Callison, Esq. Legal Department Delta Air Lines, Inc. Atlanta Airport Atlanta, Georgia 30320 (1) Robert Reed Gray, Esq. Hale Russell & Stentzel 1001 Connecticut Avenue, N.W. Washington, D. C. 20036	(2) James W. Callison, Esq.

<u>Party</u>	<u>Copies Requested</u>	<u>Service Copies</u>	<u>Additional Copies Requested</u>
Eastern Air Lines, Inc.	4	(1) James F. Bell Pogue & Neal 1001 Connecticut Avenue, N.W. Washington, D. C.	(1) James F. Bell
		(1) William V. Costello Staff Vice President-Regulatory Affairs Eastern Air Lines, Inc. 815 Connecticut Avenue, N.W. Washington, D. C.	(1) Albert W. Gotch Gotch & Crawford 12190 Rockville Pike Rockville, Maryland
The Flying Tiger Line, Inc.	4	(1) Robert M. Hausman, Esq. Ginsburg and Feldman One Farragut Square South Washington, D. C. 20006	(1) R.L. Banks and Associates 900 17th Street, N.W. Washington, D. C.
		(1) Robert A. Blanks The Flying Tiger Line, Inc. 7401 World Way West Los Angeles International Airport Los Angeles, California 90009	(1) Meyers and Dryer Shoreham Building Washington, D. C.
National Airlines, Inc.	6	(2) Andrew T. A. MacDonald Cross, Murphy & Smith 729 Fifteenth Street, N.W. Washington, D. C. 20005	(4) William A. Nelson Vice President and General Counsel National Airlines, Inc. P.O. Box 2055 Airport Mail Facility Miami, Florida 33159

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<u>Party</u>	<u>Copies Requested</u>	<u>Service Copies</u>	<u>Additional Copies Requested</u>
Northeast Airlines, Inc	5	(1) Clarence I. Peterson Foley, Hoag & Eliot 1625 I Street, N.W. Washington, D. C. 20006	(1) Edward J. Cutter Foley, Hoag & Eliot 10 Post Office Square Boston, Massachusetts 02109
		(1) Stuart W. Patton Vice President for Law 213 Security Trust Building Miami, Florida 33131	(1) Nathan S. Simat Simat, Hellieson & Associates Inc. 280 Washington Street Boston (Brighton), Massachusetts 02135
			(1) Sam I. Aldock Systems Analysis and Research Corporation 821 15th Street, N.W. Washington, D. C.
Northeast Airlines, Inc.	2	(1) Emory T. Nunneley, Jr., Esq. Vice President and General Counsel NORTHWEST AIRLINES, INC Minneapolis-St. Paul International Airport St. Paul, Minnesota 55111	
		(1) Robert N. Duggan Klagsbrunn & Hanes 710 Ring Building Washington, D. C. 20036	

<u>Party</u>	<u>Copies Requested</u>	<u>Service Copies</u>	<u>Additional Copies Requested</u>
Pacific Northern Airlines, Inc.	2	(1) Gerald P. O'Grady O'Grady and Reiber 1625 Eye Street, N. W. Washington, D. C. 20006	
		(1) Mr. Robert O. Kinsey Pacific Northern Airlines, Inc. Seattle-Tacoma International Airport Seattle, Washington 98158	
Pan American World Airways Inc.	6*	(1) Mr. Michael C. Cardman Pan Am Building New York, New York 10017	(2) Mr. Michael C. Cardman
		(1) Mr. Elihu Schott Pan Am Building New York, New York 10017	(1) Mr. Elihu Schott
		(1) Steptoe & Johnson 1250 Connecticut Ave. N. W. Washington, D. C. 20036	

* For documents & communications other than exhibits, Pan American requests 4 copies, distributed to: Mr. Cardman (one copy); Mr. Schott (two copies); and Steptoe & Johnson (one copy).

<u>Party</u>	<u>Copies Requested</u>	<u>Service Copies</u>	<u>Additional Copies Requested</u>
Seaboard World Airlines, Inc.	2	(1) Joseph H. Sharlitt, Esq. 1522 K Street, N. W. Washington, D. C. 20005	
		(1) John A. Mahoney Senior Vice-President Seaboard World Airlines, Inc. Seaboard World Building Kennedy International Airport Jamaica, New York 11430	
Trans World Airlines, Inc.	4	(1) Edmund E. Harvey, Esq. Chadbourne, Parke, Whiteside & Wolff 25 Broadway New York, New York 10004	(1) Warren E. Baker, Esq. Chadbourne, Parke, Whiteside & Wolff Shoreham Building 15th & H Streets, N.W. Washington, D. C. 20005
		(1) Mr. W. D. Brewer, Jr. Trans World Airlines, Inc. Solar Building 1000 Sixteenth Street, N. W. Washington, D. C. 20036	(1) Robin Wilson Trans World Airlines, Inc. 605 Third Avenue New York, New York 10016
United Air Lines, Inc.	4	(1) Henry L. Hill 231 South La Salle Street Chicago, Illinois 60604	(2) G. B. Slebos
		(1) G. B. Slebos Director of Regulatory Proceedings United Air Lines, Inc. P. O. Box 8800 O'Hare International Airport Chicago, Illinois 60666	

<u>Party</u>	<u>Copies Requested</u>	<u>Service Copies</u>	<u>Additional Copies Requested</u>
Western Air Lines, Inc.	3	(1) Dominic P. Renda, Esq. Senior Vice President Western Air Lines, Inc. 6060 Avion Drive Los Angeles, California 90009	(1) Dominic P. Renda, Esq.
		(1) Howard C. Westwood, Esq. Covington & Burling 701 Union Trust Building Washington, D. C. 20005	
World Airways, Inc.	3	(1) Edward J. Daly, President World Airways, Inc. Oakland International Airport Oakland, California	(1) S.S. Colker 1250 Connecticut Avenue, N.W. Washington, D. C. 20036
		(1) Lear, Scoutt & Rasenberger 1104 Brawner Building Washington, D. C. 20006	
B. <u>Other</u>			
Virginia Airports Authority & the Fairfax County Industrial Development Authority	2	(1) Stephen L. Gelband, Esq. 1522 K Street, N. W. Washington, D. C. 20005	
		(1) Paul A. Lemarie, Jr. Area Director Fairfax County Industrial Development Authority 8411 Arlington Boulevard Fairfax, Virginia 22030	

<u>Party</u>	<u>Copies Requested</u>	<u>Service Copies</u>	<u>Additional Copies Requested</u>
Cleveland Chamber of Commerce & City of Cleveland	2	(1) Andrew H. Brown Special Counsel City of Cleveland 2141 Riverside Drive Cleveland, Ohio 44107	
		(1) Ernest H. Shealy Attorney at Law Cleveland Chamber of Commerce 690 Union Commerce Bldg. Cleveland, Ohio 44115	
City and County of Denver	3	(1) Tedford Dees Assistant City Attorney 353 City and County Building Denver, Colorado 80202	(1) Landrum and Brown 309 Vinc Street Cincinnati, Ohio 45202
		(1) Edward MacNeal 348 Louella Avenue Wayne, Pennsylvania 19087	
Hawaiian Airlines, Inc.	2	(1) John H. Magoon, Jr. President Hawaiian Airlines, Inc. Honolulu International Airport P. O. Box 9008 Honolulu, Hawaii	
		(1) James M. Verner Verner, Liipfert and Bernhard Suite 1035 Universal Building North 1875 Connecticut Avenue, N. W. Washington, D. C. 20009	

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<u>Party</u>	<u>Copies Requested</u>	<u>Service Copies</u>	<u>Additional Copies Requested</u>
Minneapolis-St. Paul Metropolitan Airports Commission	2	(1) Henry G. Kuitu, Executive Director Minneapolis-St. Paul Metropolitan Airports Commission 2429 University Avenue Saint Paul, Minnesota 55114	
		(1) Albert F. Beitel 905 American Security Building Washington, D. C. 20005	
Chamber of Commerce of the New Orleans Area	2	(1) Alvin J. Liska, Attorney Office of the City Attorney City Hall New Orleans, Louisiana	
		(1) Douglas W. McIlhenny, Director of Aviation Chamber of Commerce of the New Orleans Area P. O. Box 30240 New Orleans, Louisiana 70130	
Port of Oakland	2	(1) J. Kerwin Rooney Port Attorney 66 Jack London Square Oakland, California 94607	
		(1) Deward Hext Airport Manager Metropolitan Oakland International Airport Oakland, California 94614	Appendix C Page 9 of 11

<u>Party</u>	<u>Copies Requested</u>	<u>Service Copies</u>	<u>Additional Copies Requested</u>	85 Appendix C Page 10 of 11
Portland	2	(1) Lofton L. Tatum 1310 Yeon Building Portland, Oregon 97204		
		(1) H. W. Bahls The Port of Portland P. O. Box 3529 Portland, Oregon 97208		
City of San Antonio & the San Antonio Chamber of Commerce*	2	(1) C. W. Pope 901 Kallison Tower 1222 North Main Avenue San Antonio, Texas 78212		
		(1) William A. Wildhack, Jr. 905 American Security Building Washington, D. C. 20005		
City of St. Louis & the Chamber of Commerce of Metropolitan St. Louis	4	(1) Mr. Thomas F. McGuire City Counselor 234 City Hall St. Louis, Missouri 63103	(1) Mr. Aloys P. Kaufmann Attorney for the Chamber of Commerce of Metropolitan St. Louis 224 North Broadway St. Louis, Missouri 63102	
		(1) Mr. David S. Hemenway Associate City Counselor 234 City Hall St. Louis, Missouri 63103	(1) Mr. Roland C. Marquart Transportation Commissioner Chamber of Commerce of Metro politan St. Louis 224 North Broadway St. Louis, Missouri 63102	

*Petitions for review of the Examiner's order denying intervention is pending.

<u>Party</u>	<u>Copies Requested</u>	<u>Service Copies</u>	<u>Additional Copies Requested</u>
Washington Parties	3	<p>(1) Frank P. Hayes, Esq. Assistant Attorney General Washington Utilities & Transportation Commission Room 206 Insurance Building Olympia, Washington</p> <p>(1) H. Ernest Franklin Secretary-Manager Seattle Traffic Association 215 Columbia Street Seattle, Washington</p>	<p>(1) Joel H. Fisher, Esq. 1522 K Street, N. W. Washington, D. C. 20005</p>
San Diego Unified Port District	2	<p>(1) Aaron W. Reese Port Attorney San Diego Unified Port District P. O. Box 488 San Diego, California 92112</p> <p>(1) Roy H. Gilfix Suite 500 1101 - 17th Street, N. W. Washington, D. C. 20036</p>	

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<u>Party</u>	<u>Copies Requested</u>	<u>Service Copies</u>	<u>Additional Copies Requested</u>
Baltimore Parties	2	<p>(1) Mr. Franklin E. Potter 22 Light Street Baltimore, Maryland 21202</p> <p>(1) Mr. Henry Beecken 1333 G Street, N. W. Washington, D. C. 20005</p>	
City of Phoenix	2	<p>(1) Robert J. Backstein, Acting City Attorney 930 Municipal Building 251 West Washington Street Phoenix, Arizona 85003</p> <p>(1) William J. Ralston, Airports Director 3200 Sky Harbor Boulevard Phoenix, Arizona 85034</p>	
City of Dallas	4	<p>(1) N. Alex Bickley City Attorney 501 City Hall Dallas, Texas 75201</p> <p>(1) S. G. Johndroe, Jr. City Attorney 1000 Throckmorton Street Fort Worth, Texas 76102</p>	<p>(1) Kenneth P. Tubbs Transportation Department Dallas Chamber of Commerce Fidelity Union Tower Dallas, Texas 75201</p> <p>(1) Jack C. Key, Manager Forth Worth Chamber of Commerce 700 Throckmorton Street Fort Worth, Texas 76102</p>

<u>Party</u>	<u>Copies Requested</u>	<u>Service Copies</u>	<u>Additional Copies Requested</u>
Pacific Air Lines, Inc.	3	(1) Ballard and Beasley Room 912 730 - 15th Street, N. W. Washington, D. C. 20005	(1) Ballard and Beasley
		(1) Mr. C. A. Myhre Pacific Air Lines, Inc. International Airport San Francisco, California 94128	
Airlift International, Inc.	2	(1) Lipman Redman, Esq. Melrod, Redman & Gartlan 815 Connecticut Avenue, N. W. Washington, D. C. 20006	
		(1) Mr. Frank C. Hobbs Airlift International, Inc. P. O. Box 535 International Airport Branch Miami, Florida 33148	
City of Houston and the Houston Chamber of Commerce	4	(1) Cecil A. Beasley, Jr., Esq. 912 American Security Building Washington, D. C. 20005	(1) Mr. Joseph A. Foster Director of Aviation City of Houston 904 Memorial Professional Building Houston, Texas 77002
		(1) Mr. Nathan S. Simat Nathan S. Simat Associates 1730 Cambridge Street Cambridge, Massachusetts	(1) Mr. Michael Scorcio Manager - Aviation Department Houston Chamber of Commerce P. O. Box 53600 Houston, Texas 77052

Order No. E-23910

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Issued under delegated authority
July 7, 1966

TRANSPACIFIC ROUTE INVESTIGATION

Docket 16242

ORDER GRANTING AND DENYING INTERVENTION

By Order E-23741, dated May 25, 1966, the Examiner acted upon the then pending petitions for leave to intervene in this proceeding.^{1/} Since that time petitions for leave to intervene have been filed by the following: The Mayor and City Council of Baltimore, the Chamber of Commerce of Metropolitan Baltimore and the Greater Baltimore Committee; the City of Cleveland and the Cleveland Chamber of Commerce; the Public Utilities Commission of the State of Colorado; the City of Columbus (Ohio) and the Columbus Area Chamber of Commerce; the Indianapolis Airport Authority and Indianapolis Chamber of Commerce; the Oakland (California) Chamber of Commerce; the Master Executive Council of Pan American Pilots; the City of Tampa, Florida, County of Hillsborough and the Greater Tampa Chamber of Commerce; the Virginia Airports Authority and Fairfax County Industrial Development Authority; and the State of Wisconsin.^{2/}

In order E-23741, the Examiner set forth the standards used in granting and denying intervention to states, cities and related civic groups. Upon consideration of the present petitions and application of those standards, it is found that all of the aforesaid petitioners in the state and civic category, with the exception of Columbus, Indianapolis, Tampa and the State of Wisconsin, have sufficient interest in this proceeding to justify their participation as parties.

The Master Executive Council of Pan American Pilots is composed of pilot personnel of Pan American who are members of the Air Line Pilots Association, International. Its interest is not, as in the case of the American Airlines pilots denied intervention, in supporting a new applicant

- 1/ There are now pending before the Board petitions for review of the Examiner's order filed by the Greater Cincinnati Chamber of Commerce and the Greater Cincinnati Airport, the City of Oklahoma City and the Oklahoma City Chamber of Commerce, the City of Tulsa and the Tulsa Chamber of Commerce, and the City of San Antonio and the San Antonio Chamber of Commerce.
- 2/ A petition has also been filed by the State Aeronautics Commission of the State of Connecticut. Since an identical petition submitted on behalf of the Department of Aeronautics of the State of Connecticut was denied by Order E-23741, the present petition will be dismissed

for Pacific services but rather it is in "protecting their [its members] jobs and job security against the serious threats posed by the applications of almost a score of carriers for authorization to enable them to seek Pan American's traffic and deprive Pan American pilots of their jobs."^{3/} Under the circumstances, the Council's interest is sufficient to warrant its participation as a formal party.

The Secretary of the Interior has filed a petition for leave to participate herein pursuant to Rule 14 of the Board's Rules of Practice. Unlike intervention, action upon requests to participate under Rule 14 need not be formalized by order. However, since the request has been made by a formal petition it will be granted by this order.

Pursuant to authority delegated by the Board in its Regulations, 14 CFR 385.11, it is found that the petitioners listed in ordering paragraph 1 hereof have sufficient interest in this proceeding to justify their participation as parties, and that the interests of the petitioners in ordering paragraph 2 hereof are insufficient for this purpose.

ACCORDINGLY, IT IS ORDERED:

1. That the petitions for leave to intervene filed by the following

petitioners are granted: the Mayor and City Council of Baltimore, the Chamber of Commerce of Metropolitan Baltimore and the Greater Baltimore Committee (Baltimore parties); the City of Cleveland and the Cleveland Chamber of Commerce; the Public Utilities Commission of the State of Colorado; the Oakland (California) Chamber of Commerce; the Master Executive Council of Pan American Pilots; and the Virginia Airports Authority and Fairfax County Industrial Development Authority;

2. That the petitions for leave to intervene filed by the following petitioners are denied: the City of Columbus (Ohio) and the Columbus Area Chamber of Commerce; the Indianapolis Airport Authority and the the Indianapolis Chamber of Commerce; the City of Tampa, Florida, County of Hillsborough and Greater Tampa Chamber of Commerce; and the State of Wisconsin;

3. That the petition filed by the State Aeronautics Commission of the State of Connecticut is dismissed; and

4. That the petition of the Secretary of the Interior for leave to participate herein pursuant to Rule 14 is granted.

3/ Petition for leave to intervene, p. 3.

Persons entitled to petition the Board for review of this order pursuant to the Board's Regulations, 14 CFR 385.50, may file such petitions within ten days after the date of service of this order.

This order shall be effective and become the action of the Civil Aeronautics Board upon expiration of the above period unless before that date a petition for review thereof is filed or the Board gives notice that it will review this order on its own motion.

Robert L. Park
Hearing Examiner

HAROLD R. SANDERSON
Secretary

(SEAL)

PETITION FOR REVIEW OF ORDER DENYING THE
CITY OF TAMPA, FLORIDA, THE COUNTY OF
HILLSBOROUGH, FLORIDA, AND THE GREATER
TAMPA CHAMBER OF COMMERCE LEAVE TO
INTERVENE

Come now the City of Tampa, Florida, the County of Hillsborough, Florida and the Greater Tampa Chamber of Commerce (hereinafter jointly referred to as "Tampa"), through counsel, and hereby petition this Honorable Civil Aeronautics Board to review and reverse Examiner Robert L. Park's determination in Order E-23910, July 7, 1966 to deny Tampa's Petition for Leave to Intervene herein. In support hereof it is respectfully represented and alleged as follows:

INTRODUCTION

The Examiner concluded that Tampa should be denied participation as a party in this proceeding because it does not possess sufficient interest to be granted the status of a formal intervenor under Rule 15. The Examiner treated similar communities seeking intervention in a like manner. He reasoned that only communities named as possible coterminals in the Board's Consolidation Order possess sufficient interest to participate as parties (See Order E-23741, May 25, 1966). Therefore, all points which are not potential coterminals have been, and presumably will be, denied intervention by the Examiner.

This arbitrary line of demarcation does not comport with statutory or judicially prescribed standards for measuring a community's right to intervene. It assumes that only those points which could receive nonstop

service in this proceeding have sufficient interest to participate as full parties. Points such as Tampa which could receive new single plane and/or single carrier service are not accorded similar recognition.

The Examiner's approach is dictated by procedural rather than substantive considerations. It is doubtful that he would have formulated such a restrictive rule for intervention had the number of potential intervenors been few. Thus, he states:

"The same general considerations should govern formal participation by mainland cities and their representatives in this proceeding. Even with such participation limited to those having a clear and direct interest in the outcome, the record to be developed will of necessity be large, complex, and time-consuming in preparation. Were other communities whose interests are more remote to be added, the cumulative net result would be a substantial burden upon the proceeding. Considering the magnitude of the issues, the need for expedition, and the varying nature and extent of the petitioners' interests, it is concluded that formal party status should be extended only to mainland cities (and related state and civic groups) which are being considered for designation as coterminals." (Order E-23741, p. 2, May 25, 1966).

This viewpoint cannot withstand critical analysis. As a factual matter Rule 15 intervention will not unduly burden the record. Interested persons denied formal intervention may still participate under Rule 14. They may introduce evidence and submit a memorandum, as extensive as any brief, prior to the close of the hearings. They may even cross-examine witnesses with the consent of the Examiner. Presumably, if such cross-examination appears fruitful, it will be permitted. If cross-examination appears pointless or repetitious, it is also presumed that the Examiner would stop it irrespective of whether such cross-examination is conducted by a Rule 15 party or a Rule 14 participant.

After hearing, a distinct difference separates Rule 14 and Rule 15 participation. The rights of the Rule 14 participant are cut off. The rights remaining to Rule 15 intervenors consist of submission of briefs to the Examiner, exceptions to the initial decision, briefs to the Board and the presentation of oral argument. These rights are of the utmost importance to

parties seeking to persuade the decision-makers of the soundness of their service requests. Significantly, the nature of these rights are such that their exercise does not tend to burden the record materially. No delay is involved in the submission of briefs or exceptions as intervenors must meet the same procedural dates as other parties. To be sure, time is consumed in considering these documents, and such time is properly so consumed if the documents have merit. On the other hand, if they are cumulative or of little value in resolving the issues, they will be accorded short shrift. Oral argument entails the expenditure of some time by the Board. But the extent thereof is measured by several days at most to hear all of the prospective intervenors.

In short, the contention that intervention must be sharply restricted to prevent undue delay or an overly burdensome record is not borne out by the facts. Participation at the hearings is available to all of those petitioners which the Examiner would deny intervention. The fundamental right of argument through briefs and oral presentation is permitted only to Rule 15 intervenors. However, these procedural steps do not significantly delay the proceeding. Indeed, a random perusal of Board cases reveals that, relatively, the most time-consuming aspect is the period between oral argument and final decision by the Board and the President. Consequently, the Examiner's disposition of petitions for leave to intervene in the proceeding would require the sacrifice of basic procedural rights in exchange for, at best, an insignificant saving in time.

The Examiner's approach also espouses a policy unsympathetic to the fullest representation of consumer interests. The tacit premise underlying this approach is that participation by communities should be limited to the minimum required by due process. This view reflects the belief that justice is better served by a rapid disposition of the issues than by slower

but more fulsome consideration. Perhaps, this proposition makes sense in adversary proceedings. But in fact-finding investigations vitally affecting the long-term interests of consumers, we submit that the policy emphasis should be upon maximum participation by communities consonant with reasonable procedural expedition. Our air transportation system is designed to serve the consumer. He should be given the fullest opportunity to be heard in matters which affect his interests.^{1/} Indeed, a presumption of substantial interest should attach to the request of a community to intervene, because the willingness to spend the money, time and energy entailed in full participation is itself an expression of more than casual interest. Certainly, such presumption should be rebuttable. Nevertheless, it should prevail absent countervailing facts.

Finally, from a strictly legal standpoint, the Examiner's denial of Tampa's petition cannot be sustained. By confusing procedural desiderata with substantive rights he has effectively measured Tampa's interest in this proceeding by the yardstick of the interests of other petitioners. Thus, coterminous points are permitted to intervene, while Tampa is denied intervention, because they allegedly have a greater interest in this proceeding. But the right to intervene is not a matter for comparative evaluation. Similarly, the fact that many other communities may possess the same relative interest as Tampa cannot serve to deprive that community of its right to intervene. That evaluation must be made independently. Such an evaluation would require grant of Tampa's petition under applicable Board decisions and judicial precedents.

^{1/} The Examiner has ample power to assure that the proceedings are limited to relevant, material and non-cumulative matters.

I

TAMPA'S INTEREST IN THIS PROCEEDING
IS SUBSTANTIAL AND IMMEDIATE AND WILL
NOT BE REPRESENTED BY OTHER PARTIES,
NOR ADEQUATELY PROTECTED BY RULE 14
PARTICIPATION.

Tampa does not presently receive single plane service to any Pacific point. Its only useful single carrier service is provided by Northwest through the Seattle gateway. This service is of limited value to Hawaii because of the circuitry involved in connecting through the northern gateway. Despite the paucity of Tampa's service, it generated through its own airport, over 1,200 passengers to Pacific points on American-flag carriers during fiscal 1965.^{1/} This number would have been far larger had better single carrier connecting service been available. Delta, Eastern, National, Northeast, Northwest and/or United could provide this improved service if their applications were to be granted in this proceeding.

Tampa's requirements have not been met by the services available at Miami because, first, the services available at Miami are far from satisfactory and, second, transpacific service to Miami 215 air miles in the opposite direction does not constitute transpacific service to Tampa. The best evidence of this fact is the significant volume of traffic that Tampa has generated to transpacific points through its own airport.

Miami competes with Tampa for traffic, particularly with respect to the population residing between these communities. The origin and destination surveys show the relatively different carrier and routing preferences of Tampa and Miami traffic. Under all of the circumstances, Tampa's interest cannot be properly represented by Miami. Moreover, Tampa

^{1/} C.A.B. Origin and Destination Surveys.

has a right to be represented by counsel of its own choosing rather than by Miami, which has heretofore been consistently represented by a lay traffic association without professional counsel. Cf. North Central Airlines Madison-Chicago Nonstop Service, Order E-22648, September 14, 1965.

Cf especial significance here is the Board's decision in the Reopened Southern Transcontinental Case, Order E-20427, February 3, 1964. There, the hearing examiner had denied the Commonwealth of Puerto Rico leave to intervene because Puerto Rico was an "off-segment" point located beyond the geographical scope of the investigation. The Board reversed, finding as follows:

"Puerto Rico is thus a significant source of back-up traffic to the route under investigation in this proceeding. Moreover, Puerto Rico is served by one of the carrier applicants herein, and an award to that carrier could substantially affect the nature of the service available between Puerto Rico and the points involved in this proceeding." Order E-20427, February 3, 1964.

The "significant" back-up traffic was sixteen passengers per day. Although Tampa passenger generation to the Pacific area is not as great, in terms of the only economically material consideration of traffic support--revenue passenger miles--Tampa's production to Pacific markets is far greater than Puerto Rico's production in the relevant southern transcontinental markets. Further, Tampa is served by six carriers with pending applications in this proceeding. The grant or denial of these applications cannot fail to have a substantial impact upon the transpacific services that will be available to Tampa.

After the Board's disposition of Puerto Rico's petition in the Reopened Southern Transcontinental Case, the examiners granted intervention to Colorado Springs,^{1/} Oklahoma City^{2/} and Tulsa^{3/} --all "off-segment" points. (Order E-20525, March 2, 1964.) Tampa is not beyond the geographical scope of this investigation. Under the issues it could receive single plane, one stop service to any or all of the Pacific points being considered herein. Thus, the precedents in the Reopened Southern Transcontinental Case require a fortiori that Tampa's instant petition be granted.

This result is also dictated by more recent rulings in the Pacific Northwest-Southwest Service Investigation, Docket 15469 et al., the Detroit-Toronto, Erie-Toronto Case, Docket 16928 et al., the Los Angeles/Chicago-Toronto Service Case, Docket 16901 et al. and the Reopened New York-Florida Renewal Case, Docket 12285 et al. In the Pacific-Northwest Case over forty civic bodies petitioned for leave to intervene. All petitions were granted, and no significant delay has resulted from full participation by these intervenors. Tampa was among the participants, as were many other communities that were situated beyond the geographical limits of the case, e.g., Order E-21757, February 3, 1965; Order E-21909, March 16, 1965. In the Detroit-Toronto Case most of the civic parties which were permitted to intervene represented off-segment points. The measure of their interest was that they might receive improved service as a result of the proceeding, e.g., Order E-23619, April 29, 1966; Order E-23663, May 11, 1966; Order E-23704, May 19, 1966. Similarly, in the Los Angeles/Chicago-Toronto Case all petitioning cities located on the routes of certificated carriers which

^{1/} Two passengers per day to points on the proposed route.

^{2/} Fourteen passengers per day to points on the proposed route.

^{3/} Eleven passengers per day to points on the proposed route.

could provide them single plane or single carrier service to Toronto were granted leave to intervene. (Order E-23413, March 24, 1966; Order E-23475, April 5, 1966; Order E-23585, April 27, 1966; Order E-23695, May 17, 1966.)^{1/}

Rule 14 participation will not satisfy Tampa's need for adequate representation of its interests herein. The distinctions between truncated participation under that Rule and full participation under Rule 15 were noted earlier. They were most succinctly expressed by Board Member Minetti in dissenting from the denial of intervention to Houston in the American-Eastern Merger Case.^{2/}

"There are significant differences between participating in a proceeding under Rule 14 as a nonparty and participating under Rule 15 as a formal party permitted intervention. The most important of these is that in a very real sense persons participating under Rule 14 are cut off from the Board. They may participate in the hearing to the extent allowed by the Examiner, and present a written statement to him, but they have no opportunity to make their views known to the Board (except as their views may come to the Board's attention as part of the record before the Examiner). Rule 14 participants may not file exceptions to the initial or recommended decision, may not petition for review of an initial decision, may not file a brief to the Board, may not appear before the Board in oral argument, and may not petition for reconsideration of the Board's opinion and order.

"These are important procedural rights. It is one thing to have the right to present evidence and argument to the Examiner in a case that will take many months to try and will probably result in a voluminous evidentiary record. It is another thing to be able to present oral and written argument directly to the Board, and to address this argument to particular findings or omissions in an initial decision."

Member Minetti's view that Rule 14 participation is not a substitute for intervention was judicially affirmed when the Board's denial of intervention to Houston was reversed. City of Houston v. C.A.B., 317 F 2d 158 (D. C. Cir., 1963).

^{1/} To the same effect see Order E-23233, February 15, 1966 and E-23512, April 11, 1966 in the Reopened New York-Florida Renewal Case.

^{2/} Order E-18442, June 12, 1962.

II

DENIAL OF TAMPA'S PETITION FOR LEAVE TO
INTERVENE WOULD CONSTITUTE REVERSIBLE ERROR.

The Federal Aviation Act of 1958 does not contain any specific provision relating to intervention. However, Congress has scattered expressions throughout the statute which unequivocally express its concern that all interested persons receive a full hearing in adjudicatory proceedings before the Board. Section 1001 states: "Any person may appear before the Board or Agency and be heard in person or by attorney." Section 401(g) provides:

"Any person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, or modification, suspension, or revocation of the certificate."^{1/}

Section 6(c) of the Administrative Procedure Act also prescribes that:

"Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding."

Although the term "party" is not defined by the statute, the Attorney General's Manual on the Administrative Procedure Act interprets it to mean^{2/} "any person showing the requisite interest in the matter involved."

Tampa has such an interest because it represents consumers who will be affected by the outcome of the proceeding. Associated Industries v. Ickes, 134 F. 2d 694, 705 (Second Cir., 1943); United States v. Public Utilities

^{1/} Rule 14 only provides for a submission of a memorandum to the examiner before the close of the hearings. Although it may be contended that the obligation to receive memoranda may be delegated to the Examiner, we submit that such delegation cannot be ordered for some interested parties and not others.

^{2/} A person need not show how his participation would assist the agency in arriving at a decision. American Communications Association v. United States, 298 F. 2d 648 (Second Cir., 1962); Elm City Broadcasting Corp. v. United States, 235 F. 2d 811 (D. C. Cir., 1956).

Commission, 151 F. 2d 609 (C.A.D.C., 1945); Read v. Ewing, 205 F. 2d 630 (Second Cir., 1953); United Church of Christ v. F.C.C., Case No. 19409 (D. C. Cir., March 25, 1966).

By virtue of this interest it is entitled as a matter of law to participate in the hearings fully. An integral aspect of effective participation is the opportunity to present post-hearing argument as a Rule 15 intervenor. As was held in Morgan v. U. S., 298 U. S. 468, 480 (1936): "The 'hearing' is the hearing of evidence and argument." (Emphasis supplied.) This principle has been embedded in Section 1004(a) of the Federal Aviation Act of 1958, as follows:

"In all cases heard by an Examiner or a single member the Board shall hear or receive argument on request of either party." (Emphasis supplied.)

It is no answer to Tampa's plea for status as a full party that its intervention would delay or burden the proceeding. As stated earlier this result would not occur, especially as it would present a consolidated case on behalf of the city, county and chamber of commerce. Moreover, as the Court of Appeals for the District of Columbia has stated:

"Efficient and expeditious hearing should be achieved, not by excluding parties who have a right to participate, but by controlling the proceedings so that all participants are required to adhere to the issues and to refrain from introducing cumulative or irrelevant evidence." Virginia Petroleum Jobbers Association v. F.P.C., 265 F. 2d 364, 368 (D.C. Cir., 1959).

WHEREFORE, it is respectfully requested that this Honorable Civil Aeronautics Board reverse the Examiner's ruling in Order E-23910 and grant Tampa's petition for leave to intervene.

Respectfully submitted,

Howard S. Boros

Howard S. Boros

Attorney for

City of Tampa

County of Hillsborough

Greater Tampa Chamber of Commerce

COMMISSIONER OF AVIATION

July 10, 1966

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Order No. E-23989

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 20th day of July, 1966

TRANSPACIFIC ROUTE INVESTIGATION

Docket 16242

ORDER ON RECONSIDERATION

By Order E-23740, dated May 25, 1966, the Board established the scope of this proceeding and acted upon the numerous requests for consolidation of applications.

Petitions for reconsideration of one or more aspects of the Board's order have been filed by Airlift International, Inc.; the State of Alaska, City of Fairbanks, North Star Borough, and Fairbanks Chamber of Commerce; Braniff Airways, Inc.; Delta Air Lines, Inc.; Pan American World Airways, Inc.; San Antonio; and San Jose. In addition, Wien Alaska Airlines, Inc., has filed an answer and contingent motion to consolidate Wien's application in Docket 17091 which seeks authority between Fairbanks and Juneau, on the one hand, and Minneapolis-St. Paul and Chicago, on the other hand. Also, the Tampa parties have sought by motion leave to submit a late-filed petition for reconsideration.^{1/} Numerous parties have filed answers in support of or in opposition to the various petitions.^{2/}

After careful review of the petitions and answers, the Board has concluded that reconsideration should be denied. The petitions are for the most part repetitive of matters which were before or known to the Board at the time it entered its prior order and they do not, in any event, establish error in the Board's previous determinations. Several matters do, however, warrant brief comment.

The interests of San Antonio, San Jose and Tampa are in also acquiring status as potential mainland coterminals in this proceeding. The standards used in selecting mainland coterminals, as well as the manner of their application,

- 1/ This petition has been received and is being considered on its merits.
- 2/ Alaska Airlines, Inc.; Eastern Air Lines, Inc.; the Fairbanks Parties; The Flying Tiger Line, Inc.; Northeast Airlines, Inc.; Northwest Airlines, Inc.; Pan American World Airways, Inc.; and Trans World Airlines, Inc. The motion of Alaska Airlines requesting the Board to reject the answer of the Fairbanks parties as late filed is without merit and will be denied.

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were fully set forth in our prior order. While the Board is fully sympathetic with the desires of the petitioners in this regard, we are satisfied that any further expansion of this proceeding to include these petitioners or similarly situated cities would unduly complicate and delay the proceeding and is contrary to the public interest.^{3/}

Our prior refusal to consolidate the applications of Airlift was predicated on the untimeliness of its motion and the absence of a showing of good cause for the late filing. We adhere to those determinations. However, in view of the circumstances hereinafter outlined that have arisen since our original order, we will, as a matter of discretion permit Airlift's participation in lieu of Slick.

The Slick Corporation, which has an application consolidated herein, has entered into an agreement with Airlift that contemplates the transfer of the assets and certificate of the Slick Airways Division to Airlift, subject to Board approval. By joint letter of June 6, 1966, to the Examiner, Slick and Airlift point out that, in view of Slick's decision to cease airline operations, participation in its own name in this proceeding would serve no useful purpose, and that Airlift is the real party in interest with respect to the consolidated Slick application. They request that "Airlift be substituted for Slick and be permitted to prosecute Slick's application herein either in Airlift's own name or in Slick's name."

Under the circumstances, we find no valid objection to the requested substitution. At this stage of the proceeding there should be no adverse effect upon either the issues or the other parties. Our approval of the substitution assumes, of course, that Airlift will comply fully with the procedural schedule that has been established by the Examiner.^{4/}

For the information of the parties, there are two matters of clarification. As asserted by Pan American in its petition, the Board intends to consider the question of stopovers at Fairbanks, Alaska, to the same extent that the matter is in issue with respect to the mainland co-terminals. Further, Delta is correct in its interpretation that Mexico-Hawaii local traffic rights are not at issue. As stated in our prior order, "[n]o questions of new or additional local traffic rights between the United States and Mexico are to be tried in the proceeding."^{5/}

3/ The same considerations apply to San Jose's alternative request that it be considered for possible hyphenation with San Francisco (and/or Oakland). While we recognize the importance of San Jose to the Bay area, from the standpoint of hyphenated designation the relationship is not unlike that existing in other parts of the country where similar claims could be made with equal propriety.

4/ In this connection, we have considered and rejected the objections of Flying Tiger. No other party has objected to the substitution.

5/ Order E-23740, p. 5.

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By Order E-23740 applicants with timely filed applications were afforded the opportunity to amend such applications to conform to the scope of the proceeding as it has been set by the Board. Most of the carrier applicants have filed such amended applications, and they will be consolidated by the ordering portions of this order insofar as they are consistent with the issues.

ACCORDINGLY, IT IS ORDERED THAT:

1. The following amendments to previously consolidated applications, which amend prior filings but do not supersede them in their entirety, are consolidated for hearing and decision: Alaska Airlines, Inc.

Dockets 15635 (Amended), 16749 (Amended) and 17038 (Amended); Delta Air Lines, Inc., Dockets 17024 (Amendment No. 1), 17025 (Amendment No. 1), 17133 (Amendment No. 1), and 17134 (Amendment No. 1); Eastern Air Lines, Inc., Docket 16357 (Amendment No. 4); Flying Tiger Line, Inc., Docket 15830 (Amendment No. 2); Northeast Airlines, Inc., Docket 17041 (Amendment No. 1); Pan American World Airways, Inc., Dockets 15140 (Amendment No. 1), 15440 (Amendment No. 3), and 15559 (Amendment No. 3); and the Slick Corporation, Docket 14552 (Amendment No. 2);

2. The following amendments to previously consolidated applications, which replace the prior filings in their entirety, are consolidated for hearing and decision: American Airlines, Inc., Docket 16832 (Amendment No. 2); Braniff Airways, Inc., Docket 17004 (Amendment No. 1), except to the extent that it seeks authority to provide service to Balboa/Panama City, Lima, and Santiago; Continental Air Lines, Inc., Dockets 15836 (Amendment No. 2), and 16616 (Amendment No. 2); National Airlines, Inc., Dockets 17052 (Amended) and 17053 (Amended); Northwest Airlines, Inc., Dockets 17039 (Amendment No. 1) and 17040 (Amendment No. 1); Trans World Airlines, Inc., Docket 16974 (Amendment No. 3); United Air Lines, Inc., Dockets 17018 (Amendment No. 2) and 17019 (Amendment No. 1); Western Air Lines, Inc., Dockets 17042 (Amendment No. 1) and 17043 (Amendment No. 1); and World Airways, Inc., Docket 17035 (Amendment No. 1);

3. The portion of Braniff's application listed in ordering paragraph 2 which is not being consolidated, Amendment No. 2 to the application of Trans World Airlines, Inc. in Docket 16974, and the contingent motion of Wein Alaska Airlines, Inc., to consolidate its application in Docket 17091, are dismissed;

4. Airlift International, Inc. is substituted for the Slick Corporation as the applicant with respect to the consolidated application in Docket 14522;

5. The motion of Alaska Airlines, Inc. to dismiss the answer of the Fairbanks parties to the petitions for reconsideration of Delta and Pan American is denied;

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6. The motion of the City of Tampa, Florida, County of Hillsborough, Florida and the Greater Tampa Chamber of Commerce for leave to file an untimely petition for reconsideration of Order E-23740 is granted; and

7. Except to the extent granted herein, the petitions for reconsideration of Order E-23740 filed by (1) the State of Alaska, the City of Fairbanks, North Star Borough, and Fairbanks Chamber of Commerce, (2) Airlift International, Inc., (3) Braniff Airways, Inc., (4) Delta Air Lines, Inc., (5) Pan American World Airways, Inc., (6) The City of San Antonio, Texas and the San Antonio Chamber of Commerce, (7) the City of San Jose, California, and (8) the City of Tampa, Florida, County of Hillsborough, Florida and the Greater Tampa Chamber of Commerce, are denied.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON
Secretary

(SEAL)

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Order No. E-23990

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 20th day of July, 1966

TRANSPACIFIC ROUTE INVESTIGATION

Docket 16242

ORDER AFFIRMING STAFF ACTION

Under authority delegated by the Board in the Board's Regulations, 14 CFR 385.11, Examiner Robert L. Park issued Order E-23741, on May 25, 1966, which denied some then pending petitions for leave to intervene. Pursuant to 14 CFR 385.51, petitions for discretionary review of said order were filed by the Greater Cincinnati Chamber of Commerce and the Greater Cincinnati Airport, the City of Oklahoma City and the Oklahoma City Chamber of Commerce, the City of Tulsa and the Tulsa Chamber of Commerce, and the City of San Antonio (Texas) and the San Antonio Chamber of Commerce. Upon consideration of the matters presented the Board has determined to exercise its right to review and, upon such review, to affirm the examiner's denial of intervention to the four communities.

In Order E-23740, May 25, 1966, establishing the present proceeding, the Board determined that it should hear in the case all air carrier applications seeking new route authority to engage in air transportation between some 25 specified U.S. coterminal points, on the one hand, and Hawaii and points beyond in the Pacific, on the other hand. Consistent with that determination, the Board consolidated into the proceeding the applications of 19 carriers seeking new transpacific authority.

Since the petitioning communities were not included among the mainland coterminal points designated by the Board in its order establishing the proceeding, no air carrier could receive authority in the case that would enable it to provide nonstop service between the petitioning communities and Hawaii or points beyond. On the other hand, since each of the petitioning communities is now named as a point on the existing domestic routes of one or more of the air carrier applicants, a grant of the application of a particular carrier in this case could make possible new single-carrier or single-plane service between the petitioning

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communities and points in the Pacific over a combination of the carrier's existing domestic route authority and new transpacific authority that might be granted it in the present proceeding, whereas the selection of some other carrier that lacks existing domestic authority to serve the petitioning communities would preclude such a result. This being so, it is apparent that the communities have an interest in the proceeding and, under other circumstances, would be granted leave by the Board to intervene. See Order E-20427, February 3, 1964.

However, under the circumstances of the present proceeding, the Board is compelled to the conclusion that the petitions must be denied. As noted in the order establishing the present proceeding, the case will at best be large, complex, and time-consuming, and the public interest requires that the Board make every effort to keep it within reasonable bounds. It is readily apparent that the petitioning communities are not peculiarly situated, but have an interest that is shared by virtually all other major cities of the United States that are now named as points on the domestic routes of one or more of the air carriers which have applications for transpacific authority consolidated into this proceeding. This being so, a grant of intervention to the petitioning communities would require the Board, as a matter of fairness, similarly to grant intervention to numerous other communities, with a resulting substantial increase in the number of parties, the size and complexity of the record, and the time that would be required to reach a decision in the case.

We are convinced that the petitioners' interest will be adequately protected through a combination of air carrier parties, other community parties having an interest similar to their own, and their own participation under Rule 14 of the Board's Rules of Practice. As previously noted, petitioners' interest lies in having the Board certificate as mainland coterminal points on the new transpacific routes "gateway" cities through which they could receive improved service over a combination of existing domestic route authorizations and the new transpacific route authorizations. It is readily apparent that individual air carrier applicants and community parties that could be designated as terminal points, and as such would become gateway cities through which improved service could be provided to the petitioning communities here will be actively urging their certification. Moreover, it is reasonable to assume that individual air carrier applicants, and probably community parties, will support their cases with evidence on "backup traffic" from points on existing domestic routes that could and would move via the gateway points over the new transpacific routes. The petitioning communities will, of course, have a full opportunity under Rule 14 to urge the certification of carriers and gateway cities that would make possible single-carrier and single-plane service for them.

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San Antonio specifically alleges that since it was allowed to become a party to the previous Transpacific Route Case there is no basis for refusing to accord it similar standing in the present proceeding, and that action permitting Dallas and Houston to become parties here but denying party status to San Antonio discriminates against it. We find no merit in these contentions. This is a new proceeding that involves different proposals and different issues, which, in turn, create different problems. The Board's decision on petitions to intervene in the present case must be based on the situation here and not on the action it may have taken in an earlier case.^{1/}

The present proceeding is substantially larger and more complex than the prior proceeding and, accordingly, the need to avoid any unnecessary expansion of the case is significantly greater. Equally important, due to circumstances beyond the Board's control the review of

the transpacific route pattern which the Board undertook in 1959 still has not been completed. It is therefore imperative in the interest of the traveling public and of the U.S. international flag carriers who seek adjustments of their routes to improve their competitive position against foreign flag operators that the Board take all reasonable steps to insure the earliest possible disposition of that review.^{2/}

San Antonio's claim of discrimination, in essence, goes not to the Board's action on intervention but to its determination in framing the issues in the case that Houston and Dallas should be included as possible coterminal points but San Antonio should not. It was that action which brought about a difference in the directness and degree of interest of the communities. Further, it is clear that this is not a situation in which two nearby communities are vying for authority that the public convenience and necessity may dictate be granted to only one of them. As the previous discussion shows, the certification of a carrier now serving, for example, Houston, and the designation of Houston as a coterminal point on a transpacific route far from prejudicing San Antonio may well increase its chances of obtaining improved service to the Pacific.

- ^{1/} In this connection, it should be pointed out that San Antonio's intervention in the prior proceeding occurred at the reconsideration stage and was granted for the purpose of permitting it to support a reconsideration petition of Continental Air Lines which, if granted, would have injected into the case for the first time the issue of direct service between points in the Southwest on Continental's routes and points in the Pacific. (Orders E-19536 and E-19577, April 29 and May 13, 1963.
- ^{2/} The President in his letter of February 11, 1966, setting forth his actions on the Board's decision in the Transatlantic Route Case, Docket 13577 et al., specifically advised the Board that "it is important that we proceed quickly to determine whether our transpacific route pattern should be altered so as to place our carriers in a satisfactory competitive position in the Pacific with foreign flag carriers operating into the east coast."

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Except as modified herein, we adopt as our own the findings of the hearing examiner in Order E-23741

ACCORDINGLY, IT IS ORDERED:

1. That the petitions of the Greater Cincinnati Chamber of Commerce and the Greater Cincinnati Airport, the City of Oklahoma City and the Oklahoma City Chamber of Commerce, the City of Tulsa, and the Tulsa Chamber of Commerce, the City of San Antonio, and the San Antonio Chamber of Commerce for review of Order E-23741, dated May 25, 1966, be and they hereby are granted

2. That, upon Board review, the staff action taken in Order E-23741 be and it hereby is affirmed

By the Civil Aeronautics Board:

HAROLD R. SANDERSON
Secretary

(SEAL)

PETITION FOR REVIEW OF ORDER
DENYING PETITION TO INTERVENE

The State of Wisconsin hereby petitions the Civil Aeronautics Board, pursuant to the provision of Rule 28 of the Board's Rules of Practice, for review of Order E-23910, July 8, 1966, denying intervention by the State in this matter. The denial of intervention is contrary to law and precedent, poses substantial questions of law and of policy, and involves a prejudicial procedural error; the Board should, and indeed must, grant review and grant intervention by the State of Wisconsin.

Specifically, the denial of the State of Wisconsin's petition to intervene is contrary to the decision of the Court of Appeals for the District of Columbia in City of Houston v. C.A.B., 317 F. 2d 158 (1963). It is contrary to the precedent established, inter alia, in the Reopened Southern Transcontinental case in 1964 on the petition for intervention of the Commonwealth of Puerto Rico. The denial poses substantial questions of law and policy insofar as it rests on the assumption that Wisconsin's interests can be represented by other parties: first, Wisconsin's interests conflict with those of the nearby areas (e.g., Chicago) considered for potential coterminal status; secondly, the interests of a sovereign state, representing the requirements of its citizens and discharging obligations imposed by the laws of the state, cannot be represented by third parties, and its rights cannot be denied because of alleged procedural burdens. Finally, the denial is irrevocably prejudicial, not only because the proceeding will lay down route patterns to be effective for years and decades ahead, but because judicial review may be unavailable to remedy the error at the conclusion of the pro-

ceeding. Chicago and Southern Airlines, Inc. v. Waterman Steamship Corporation, 333 U.S. 103 (1948).

The Board by Order E-22314, dated June 15, 1965, instituted a new international investigation to determine the awarding of various routes from points in the United States to the Orient. On May 25, 1966, the Board issued its Consolidation Order E-23740, which consolidated the various applications filed by carriers and designated various communities as potential mainland coterminal points which would be considered for certification of service. Examiner Robert L. Park, under delegated authority, issued Order E-23741, dated May 25, 1966, designated as an Order Granting and Denying Intervention, in which he concluded that formal party status should be extended only to mainland cities (and related state and civic groups) which are being considered for designation as coterminals. To include others, he concludes, would place a substantial burden upon the proceeding. Examiner Park, again acting under delegated authority, by Order E-23910, dated July 7, 1966, applied said standards and denied Wisconsin's petition. Examiner Park, in Order E-23741, stated that this

"... approach was motivated by the Board's desire to give realistic consideration to possible present and future air service needs while, at the same time, keeping the proceeding within reasonable bounds." (pp. 1, 2)

The order went on to observe, and perhaps find, that

"No prejudice or injury should result to the petitioners in the civic category which are being denied formal party status. In view of the large number of applicants and the wide geographical distribution of the potential coterminals, their general interest in improved service for their particular areas can be adequately represented and developed by the formal participants." (Id. at p. 2)

The State in its petition for leave to intervene in this proceeding (June 10, 1966) cited the nature of its interest, the statutory policy of the State, its existing interest in service to the Pacific on presently

authorized air carrier routes, its absolute position and that of the State's gateway city, Milwaukee, in population, metropolitan size, buying income and international air traffic. The petition went on to cite the conflict between Wisconsin's interests and the interests involved with the nearest potential coterminal city consolidated in the proceeding (Chicago), a conflict fully explored in the recent Board proceeding, American Airlines-Milwaukee Deletion Case, Docket 14494. Finally, the petition noted the State's participation in the prior Transpacific proceedings. On the basis of these allegations, Wisconsin maintains that it has a right to intervene in the instant proceeding and that this right should not be denied by the Board.

The Court of Appeals for the District of Columbia has ruled that the Board must grant intervention in a situation where another municipality with competing rights has been granted intervention in a proceeding which might vitiate the position of the petitioner community. City of Houston, Texas, v. C.A.B., supra. The Court's holding governs Wisconsin's petition here. Wisconsin has endeavored through formal proceedings for many years to establish its separate interest in air service from its gateway, Milwaukee, to communities with which Wisconsin has an interest. Wisconsin has repeatedly cited the inconvenience and attendant adverse economic impact suffered by the State and its citizens as a result of being forced to rely upon service through Chicago and its O'Hare Airport; the surface distances, airport congestion, air traffic congestion and all the additional costs imposed upon Wisconsin air travellers and absorbed by Wisconsin businesses are a material and substantial reason for Wisconsin's effort here.

Wisconsin's gateway city, Milwaukee, is currently authorized on the routes of two carriers authorized to serve the Pacific. It has in the past had single-carrier connecting service to the Pacific. In acting upon motions to consolidate, the Board has ignored the applications of these carriers to

the extent that they would, if granted, have permitted them to provide direct service between Milwaukee and points in the Pacific. By denying intervention to Wisconsin, the Board will not only preclude Wisconsin from supporting vitally needed new services comprehended within these applications, but threatens to deprive Milwaukee of carrier authorizations now benefiting the community and the State and will give preferred status to other communities, many smaller than Milwaukee, which have no historic interest in single-carrier or single-plane service to the Pacific. Milwaukee has generated more traffic, out of its own airport, to and from Hawaii, than five cities named as potential coterminals (Compare CAB International O&D, 1964, for Milwaukee and for Houston, Buffalo, Atlanta, Miami and New Orleans); and has total traffic, including that "drained" to Chicago that would place it in eleventh rank among mainland cities (see Docket 14924). Milwaukee generated more recorded O&D traffic to major Far East cities (Bangkok, Hong Kong, Manila, Okinawa, Seoul, Taipei, and Tokyo) than did either New Orleans or Phoenix, named as potential coterminals, and was ninth ranked among all mainland cities when total Milwaukee traffic, including that drained to Chicago is included (Docket 14924).

The Board's own policy in prior cases clearly establishes Wisconsin's rights in this case. In the Reopened Southern Transcontinental case, where there was at issue only the question of selection of carrier on the trans-Gulf route, a route that did not touch Puerto Rico, the Board, reversing its staff decision, held that Puerto Rico's interest in the possibility of single-plane service by one of the two carriers in question was sufficient to entitle Puerto Rico to intervene. E-20427, February 3, 1964, reversing, E-20256, December 11, 1963.¹

The Court has, thus, held that a civic party is entitled to intervention where invidious comparative considerations are at issue and the Board has held that a community representing a substantial source of "back-up" traffic

with an existing interest in the service offered by an affected air carrier applicant is entitled to intervention. Under either standard, Wisconsin is entitled to intervene in this case.

A state has a special obligation in the representation of the interest of its citizens and is entitled to be heard on public questions before the Board under Sections 102 and 401 (d) of the Act. The Act itself recognizes the special interest of states, through their administrations, in Board proceedings and goes so far as to establish special procedures available for dealing with states in matters before the Board. Section 204 (b) of the Federal Aviation Act of 1958, 49 U.S.C. 1324. To suggest that a state, which has a substantial interest in a matter pending before the Board, as in this proceeding, must be confined to the role permitted under Rule 14 of the Board's Rules of Practice, is clearly erroneous.

WHEREFORE, the State of Wisconsin respectfully petitions the Board for review of Order E-23910 and urges the Board, upon review, to grant the State's petition to intervene under Rule 15 of the Board's Rules of Practice, with all the rights and privileges accorded a party under that rule.

Respectfully submitted,

BRONSON C. LA FOLLETTE
Attorney General

/s/ George B. Schwann

GEORGE B. SCHWANN
Assistant Attorney General

Attorneys for the State of Wisconsin.

Dated: July 21, 1966

¹ See also Boros, Intervention in Civil Aeronautics Board Proceedings, 17 Adm. Law Rev. 5, 23 (Fall, 1964) for a discussion of this case and subsequent actions in the same case.

CERTIFICATE OF SERVICE

* * *

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Order No. E-24082

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 15th day of August, 1966

TRANSPACIFIC ROUTE INVESTIGATION

Docket 16242

ORDER AFFIRMING STAFF ACTION

Under authority delegated by the Board in the Board's Regulations, 14 CFR 385.11, Examiner Robert L. Park issued Order E-23910, on July 7, 1966, which denied some then pending petitions for leave to intervene. Pursuant to 14 CFR 385.51, petitions for discretionary review of said order were filed by the State of Wisconsin and the City of Tampa, Florida, the County of Hillsborough, Florida, and the Greater Tampa Chamber of Commerce.

Upon consideration of the matters presented the Board has determined to exercise its right to review and, upon such review, to affirm the Examiner's denial of intervention to the petitioners. The contentions raised by the petitions are essentially the same as those considered and rejected by the Board in Order E-23990, dated July 20, 1966. We find no error in the Examiner's disposition of these requests for leave to intervene.

ACCORDINGLY, IT IS ORDERED:

1. That the petitions of the State of Wisconsin and the City of Tampa, Florida, County of Hillsborough, Florida, and the Greater Tampa Chamber of Commerce, for review of Order E-23910, dated July 7, 1966, are granted; and
2. That, upon Board review, the staff action taken in Order E-23910 is affirmed.

By the Civil Aeronautics Board:

(SEAL)

MABEL McCART
Acting Secretary

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITY OF SAN ANTONIO, ET AL.,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

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No. 20,383

PREHEARING CONFERENCE STIPULATION

Pursuant to Rule 38(k) of the Rules of the Court, and subject to its approval, the parties hereby stipulate and agree as follows with respect to the issues, the certified record, the joint appendix, and mainland cities included in applications for transpacific service.

I

ISSUES

The Civil Aeronautics Board held hearings on airline service between points in the United States and points in the Pacific Ocean and Orient. This proceeding, Docket No. 7723, had two phases: (1) a "domestic" phase involving service to Hawaii, and (2) a "foreign" phase involving service to points in the Orient and United States possessions in the Pacific Ocean. The Board terminated that proceeding, largely with denial of all applications. Thereafter, the Board instituted a new investigation involving both domestic and international services in the Pacific area (Docket 16242).

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Petitioner's issues are as follows:

1. When the Board purported to name the 25 largest cities in the United States judged by population and traffic generation (the rank modified only to secure what it deemed to be proper geographical balance throughout the United States) as potential mainland coterminal points, and did not, after appropriate request, include San Antonio, although San Antonio alleged a competing interest with some of the named cities, did the Board act arbitrarily and deny San Antonio due process and essential fairness?

2. Did the Board err in denying San Antonio's petition for leave to intervene on the grounds that it was not one of the 25 potential mainland points and its inclusion would unduly enlarge the proceeding, if San Antonio had a competing interest with other named points which were permitted to intervene in the proceeding?

3. Did San Antonio, by virtue of its intervention in Docket No. 7723, automatically become an intervenor in Docket 16242?

Respondent reserves the right in its brief to rephrase petitioner's issues or to take the position that some or all of the points raised in said issues are irrelevant, without foundation in the record, not preserved below, or otherwise not open to review. Petitioner specifically agrees that any grounds of error not urged in his opening brief shall be treated as abandoned for purposes of review herein, although he reserves the right to respond on reply brief to any matters raised in respondent's brief.

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II

CERTIFIED RECORD

Pursuant to Rule 38(g) of the Rules of the Court, it is stipulated that the record certified to the Court by respondent, upon which were entered Board orders E-23740, E-23741, E-23989, and E-23990, consists of the following items, and that these items shall become the record in this proceeding:

- (1) Board Order E-22314
- (2) Board Order E-22995
- (3) Petition of San Antonio to Intervene, April 26, 1966
- (4) Board Order E-23740
- (5) Board Order E-23741
- (6) Petition of San Antonio for reconsideration of Order E-23740, June 6, 1966
- (7) Petition of San Antonio for review of Order E-23741, June 6, 1966
- (8) Report of prehearing conference, July 1, 1966
- (9) Board Order E-23989
- (10) Board Order E-23990

III

MAINLAND CITIES INCLUDED IN APPLICATIONS

It is stipulated that the following United States mainland cities were included in the carriers' applications for transpacific service in the Board proceeding. ^{1/}

<u>Docket</u>	<u>Carrier</u>	<u>Cities</u>
15559	Pan American	New York, Boston, Detroit, Chicago, Philadelphia, (continued)

^{1/} Cities marked by an * were not included in the Board's 25 potential mainland coterminal points (see issue 1 in heading I, supra); cities marked by a / were added to the original applications by amendments thereto; and cities in parentheses were deleted from the original applications by amendments thereto.

(footnote continued)

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<u>Docket</u>	<u>Carrier</u>	<u>Cities</u>
15559 (continued)		Washington/Baltimore, Seattle/Tacoma, Portland, Buffalo/Niagara Falls /, Pittsburgh /, Cleveland /, Kansas City /, Minneapolis /, St. Louis, Mo. /, Atlanta /, Miami/Ft. Lauderdale /, Dallas/Ft. Worth /, Houston /, New Orleans /, Phoenix /, Denver /, San Diego /
15830	Flying Tiger	Los Angeles, San Francisco, Portland, Seattle/Tacoma, Chicago, Detroit, Boston /, Hartford / *, New York /, Philadelphia /, Buffalo /, Binghamton / *, Cleveland /, Milwaukee / *
15836	Continental Airlines	San Francisco, Los Angeles, San Diego, (Las Vegas *), Phoenix, (Tucson *), (Albuquerque *), (Lubbock *), Dallas, Houston, (El Paso *), (Midland/Odessa *), (San Antonio *), Denver /, Kansas City /, Chicago /, New York /, Washington /, St. Louis /, New Orleans /, Portland /, Seattle/Tacoma /, Boston /, Buffalo/N.F. /, Philadelphia /, Pittsburgh /, Cleveland /, Detroit /, Minneapolis/S.P. /, Atlanta /, Miami /

The following hyphenated coterminals have been listed, in most cases, by reference to the first city only. New York/Newark, Washington/Baltimore, San Francisco/Oakland, Dallas/Fort Worth, Seattle/Tacoma, Buffalo/Niagara Falls, Minneapolis/St. Paul, Miami/Fort Lauderdale, Los Angeles/Long Beach, Los Angeles/Burbank, Tampa/St. Petersburg/Clearwater.

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<u>Docket</u>	<u>Carrier</u>	<u>Cities</u>
16357	Eastern Airlines	Boston, New York, Philadelphia, Washington, Detroit, Chicago, St. Louis, Dallas/Ft. Worth, Houston, Atlanta, Miami, Seattle/Tacoma /, New Orleans /, San Francisco/Oakland /, Los Angeles /, Kansas City /, Denver /, Phoenix /, San Diego /, Portland /, Buffalo/N.F. /, Pittsburgh /, Cleveland /, Minneapolis /, Detroit /
16749	Alaska Airlines	Seattle
16832	American Airlines	San Francisco/Oakland, Los Angeles/Long Beach, San Diego, Phoenix /, (Tucson *), (Douglas *), (El Paso*), (San Antonio*), Houston /, Dallas/Ft. Worth /, (Oklahoma City*), (Tulsa*), St. Louis /, Chicago, (Milwaukee*), (Little Rock*), (Memphis*), (Nashville*), (Knoxville*), (Charleston-Dunbar*), (Louisville*), (Cincinnati*), (Dayton*), (Columbus*), Cleveland /, Pittsburgh /, Washington/ Baltimore /, (Wilmington *), Philadelphia, New York, (Hartford- Springfield*), (Providence*), Boston /, Detroit /, Buffalo/ N.F. /, (Rochester*), (Syracuse*), (Albany*), (Indianapolis*)
16974	TWA	Los Angeles, San Francisco, Boston /, New York /, Philadelphia /, Washington /, Detroit /, Chicago /, St. Louis /, Kansas City /, Pittsburgh /, Cleveland /, Atlanta /, Miami /, Denver /, Phoenix /, Seattle/Tacoma /, Portland /

<u>Docket</u>	<u>Carrier</u>	<u>Cities</u>
17004	Braniff	New York, Miami, Chicago, Dallas, Houston, (San Antonio*), Los Angeles, San Francisco/Oakland, Seattle/, Washington /, Minneapolis/St. Paul /, St. Louis /, Atlanta /, New Orleans /, Denver /, San Diego /, Portland /
17032	Pacific Airlines	San Francisco
17024	Delta Airlines	San Francisco, Los Angeles, San Diego
17025	Delta Airlines	San Francisco, Los Angeles, San Diego
17052	National Airlines	Los Angeles, San Francisco, San Diego, Miami /, Atlanta /, New Orleans /, Dallas /, Houston /, Phoenix /, Portland /, Seattle /
17053	National Airlines	San Francisco, Los Angeles, San Diego, Miami /, Atlanta /, New Orleans /, Dallas /, Houston /, Phoenix /, Portland /, Seattle /
17039	Northwest Airlines	Boston, New York, Philadelphia, Washington, Detroit, Chicago, Minneapolis/St. Paul, Houston, Dallas, Los Angeles, San Francisco, Portland, Seattle
17040	Northwest Airlines	Boston, New York, Philadelphia, Washington, Detroit, Chicago, Minneapolis/St. Paul, Houston, Dallas, Los Angeles, San Francisco, Portland, Seattle
17023	Pacific Northern Airlines	Seattle, Portland
17028	Seaboard World Airlines	New York, Boston, Philadelphia, Washington, Detroit, Chicago, Seattle

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<u>Docket</u>	<u>Carrier</u>	<u>Cities</u>
17018	United Airlines	San Francisco, Los Angeles, New York, Chicago, Seattle, Boston /, Buffalo /, Philadelphia /, Pittsburgh /, Washington /, Cleveland /, Detroit /, Kansas City /, New Orleans /, Houston /, Dallas /, Denver /, San Diego /, Portland /
17019	United Airlines	San Francisco, (Sacramento*), Los Angeles, San Diego, (Las Vegas*), (Grand Junction*), Denver, (Lincoln*), (Omaha*), Kansas City, (Des Moines*), (Cedar Rapids*), (Iowa City*), (Moline*), (Milwaukee*), Chicago, (South Bend*), (Ft. Wayne*), (Toledo*), Detroit, Cleveland, (Akron*), (Youngstown*), Pittsburgh, (Allentown*), (Bethlehem/Easton*), Philadelphia, New York, (Hartford*), (Springfield*), (Providence*), Washington, Boston, Dallas /, Houston /, New Orleans /, Buffalo /
17043	Western Airlines	Minneapolis/St. Paul, Denver, Phoenix, Dallas, Houston, New Orleans (Salt Lake C*), (Las Vegas*), Seattle, Portland, San Francisco, Los Angeles, San Diego/Chi /, Cleveland /, Detroit /, Kansas City /, St. Louis /
17035	World Airlines	Seattle, Portland, San Francisco, Los Angeles
17038	Alaska Airlines	Seattle, Portland
17133	Delta Airlines	San Francisco, Los Angeles, San Diego, Dallas, Houston, New Orleans, Atlanta (Tampa*), Miami

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<u>Docket</u>	<u>Carrier</u>	<u>Cities</u>
17134	Delta Airlines	San Francisco, Los Angeles, San Diego, Dallas, Houston, New Orleans, Atlanta, (Tampa*), Miami
14552	Slick Airways	Los Angeles, San Francisco, Chicago, Dallas, New York, Houston /, St. Louis /, Detroit /, New Orleans /, Miami /, Philadelphia /, Boston /
15440	Pan American	San Francisco, Los Angeles, Boston /, Buffalo /, New York /, Philadelphia /, Pittsburgh /, Washington /, Baltimore /, Chicago /, Cleveland /, Detroit /, Kansas City /, Minneapolis /, St. Louis /, Atlanta /, Miami /, Dallas /, Houston /, New Orleans /, Phoenix /, Denver /, San Diego /

IV

PROCEDURE WITH RESPECT TO JOINT APPENDIX

The joint appendix shall consist of the stipulated certified transcript of record (see heading II, supra) and this stipulation.

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This stipulation shall be placed at the end of the certified record and shall be numbered consecutively therewith. All briefs shall cite the joint appendix by referring to the page number thereof

"(J.A. ____)"

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CITY OF SAN ANTONIO, ET AL.,	:	
	:	
Petitioners,	:	
	:	
v.	:	No. 20,383
	:	
CIVIL AERONAUTICS BOARD,	:	
	:	
Respondent.	:	
-----	:	

SUPPLEMENTAL PREHEARING CONFERENCE STIPULATION

In heading III of the Prehearing Conference Stipulation filed with the Court herein, the parties stipulated to the list of United States mainland cities which were included in the carriers' applications for transpacific service in the Board proceeding. Through inadvertence, however, three applications were omitted. The parties thus hereby stipulate that the cities named in the following applications were included in the carriers' applications for transpacific service in the Board proceeding (the same set of symbols will be used as was explained in footnote 1 of the original stipulation).

<u>Docket</u>	<u>Carrier</u>	<u>Cities</u>
16616	Continental Air Lines	New York, Washington, Chicago, Kansas City, Denver, Houston, Dallas, (San Antonio*), San Diego, Los Angeles, San Francisco, Seattle, Portland /, Newark /, Baltimore /, St. Louis /, New Orleans /, Phoenix /, Long Beach /, Boston /, Buffalo /, Philadelphia /, Pittsburgh /, Cleveland /, Detroit /, Minneapolis /, Atlanta /, Miami /

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<u>Docket</u>	<u>Carrier</u>	<u>Cities</u>
17041	Northeast	Washington, Philadelphia, New York, Boston, (Hartford*), Buffalo, Cleveland, Detroit, Chicago, Minneapolis, Seattle, Denver, Los Angeles, San Francisco, Miami, (Tampa*), Atlanta, New Orleans, Houston, Dallas, (San Antonio*), San Diego /, Tacoma /, Kansas City /, Newark /, Phoenix /, Pittsburgh /, San Diego /, St. Louis /
17042	Western	Miami, Denver, Phoenix, Dallas, Houston, New Orleans, (Salt Lake City*), (Las Vegas*), Seattle, Portland, San Francisco, Los Angeles, San Diego, Chicago /, Cleveland /, Detroit /, Kansas City /, St. Louis /, Atlanta /, Miami /, Long Beach /

This supplemental stipulation shall be included in the joint appendix. It shall be placed at the end of the original stipulation and shall be numbered consecutively therewith.

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905 American Security Building
Washington, D.C. 20005

Joseph B. Goldman
General Counsel
Civil Aeronautics Board
Washington, D.C. 20428

Dated:

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE GREATER TAMPA CHAMBER OF
COMMERCE, ET AL.,
Petitioners,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

No. 20,464

PREHEARING CONFERENCE STIPULATION

Pursuant to Rule 38(k) of the Rules of the Court, and subject to its approval, the parties hereby stipulate and agree as follows with respect to the issues, the certified record, the joint appendix, and mainland cities included in applications for transpacific service.

I

ISSUES

The Civil Aeronautics Board held hearings on airline service between points in the United States and points in the Pacific Ocean and Orient. This proceeding, Docket No. 7723, had two phases: (1) a "domestic" phase involving service to Hawaii, and (2) a "foreign" phase involving service to points in the Orient and United States possessions in the Pacific Ocean. The Board terminated that proceeding, largely with denial of all applications. Thereafter, the Board instituted a new investigation involving both domestic and international services in the Pacific area (Docket 16242).

Petitioners' issues are as follows:

1. Did the Board err in its establishment of standards for determination of potential mainland coterminal points at which certification of service is to be considered?

2. Did the Board err in applying the aforesaid standards to exclude consideration of Tampa, Florida, as a potential mainland co-terminal point?

3. Did the Board err in its establishment of standards for determination of sufficient interest to participate as a party pursuant to 14 C.F.R. 302.15?

4. Did the Board err in denying petitioners' petition to intervene as a party pursuant to 14 C.F.R. 302.15?

Respondent reserves the right in its brief to rephrase petitioners' issues or to take the position that some or all of the points raised in said issues are irrelevant, without foundation in the record, not preserved below, or otherwise not open to review.

II

CERTIFIED RECORD

Pursuant to Rule 38(g) of the Rules of the Court, it is stipulated that the record certified to the Court by respondents, upon which were entered Board orders F-23740, E-23910, E-23989, and E-24082, consists of the following items, and that these items shall become the record in this proceeding:

- (1) Board Order E-22314
- (2) Board Order E-22995
- (3) Motion of Tampa for Leave to File Petition for Reconsideration of Order E-23740, and Petition for Reconsideration of Order E-23740, June 13, 1966
- (4) Board Order E-23740
- (5) Board Order E-23741
- (6) Board Order E-23910
- (7) Report of prehearing conference, July 1, 1966
- (8) Board Order E-23989
- (9) Board Order E-23990

(10) Petition of Tampa for Review of Order E-23910, July 18, 1966

(11) Board Order E-24082

III

MAINLAND CITIES INCLUDED IN APPLICATION

It is stipulated that the following United States mainland cities were included in the carriers' applications for transpacific service in the Board proceeding.^{1/}

^{1/} Cities marked by an * were not included in the Board's 25 potential mainland coterminal points (see issue 1 in heading I, supra); cities marked by a + were added to the original applications by amendments thereto; and cities in parentheses were deleted from the original applications by amendments thereto.

The following hyphenated coterminals have been listed, in most cases, by reference to the first city only. New York/Newark, Washington/Baltimore, San Francisco/Oakland, Dallas/Forth Worth, Seattle/Tacoma, Buffalo/Niagara Falls, Minneapolis/St. Paul, Miami/Fort Lauderdale, Los Angeles/Long Beach, Long Angeles/Burbank, Tampa/St. Petersburg/Clearwater.

<u>Docket</u>	<u>Carrier</u>	<u>Cities</u>
14552	Slick Airways	Los Angeles, San Francisco, Chicago, Dallas, New York, Houston+, St. Louis+, Detroit+, New Orleans+, Miami+, Philadelphia+, Boston+
15440	Pan American	San Francisco, Los Angeles, Boston+, Buffalo+, New York+, Washington+, Baltimore+, Chicago+, Cleveland+, Detroit+, Kansas City+, Minneapolis+, St. Louis+, Atlanta+, Miami+, Dallas+, Houston+, New Orleans+, Phoenix+, Denver+, San Diego+, Philadelphia+, Pittsburgh+.
15559	Pan American	New York, Boston, Detroit, Chicago, Philadelphia, Washington-Balti-

		more, Seattle-Tacoma, Portland, Buffalo/Niagara Falls+, Pittsburgh+, Cleveland+, Kansas City+, Minneapolis+, St. Louis, Mo., Atlanta+, Miami/Ft. Lauderdale+, Dallas/Ft. Worth+, Houston+, New Orleans+, Phoenix+, Denver+, San Diego+
15830	Flying Tiger	Los Angeles, San Francisco, Portland, Seattle/Tacoma, Chicago, Detroit, Boston+, Hartford+*, New York+, Philadelphia +, Buffalo+, Binghamton+*, Cleveland +, Milwaukee+*
15836	Continental Airlines	San Francisco, Los Angeles, San Diego, (Las Vegas*), Phoenix, (Tucson*), (Albuquerque*), (Lubbock*), Dallas, Houston, (El Paso*), (Midland/Odessa*), (San Antonio*), Denver+, Kansas City+, Chicago+, New York+, Washington+, St. Louis+, New Orleans+, Portland+, Seattle/Tacoma+, Boston+, Buffalo/N.F.+ Philadelphia+, Pittsburgh+, Cleveland+, Detroit+, Minneapolis/St. Paul+, Atlanta+, Miami+
16616	Continental Airlines	New York, Washington, Chicago, Kansas City, Denver, Houston, Dallas, (San Antonio*), San Diego, Los Angeles, San Francisco, Seattle, Portland+, Newark+, Baltimore+, St. Louis+, New Orleans+, Phoenix+, Long Beach+, Boston+, Buffalo+, Philadelphia+, Pittsburgh+, Cleveland+, Detroit+, Minneapolis+, Atlanta+, Miami+
16357	Eastern Airlines	Boston, New York, Philadelphia, Washington, Detroit, Chicago, St. Louis, Dallas/Ft. Worth, Houston, Atlanta, Miami, Seattle/Tacoma+, New Orleans+, San Francisco/Oakland+, Los Angeles+, Kansas City+,

		Denver+, Phoenix+, San Diego+, Portland+, Buffalo/N.F.+, Pittsburgh+, Cleveland+, Minneapolis+, Detroit+
16749	Alaska Airlines	Seattle
16832	American Airlines	San Francisco/Oakland, Los Angeles/Long Beach, San Diego, Phoenix+, (Tucson*), (Douglas*), (El Paso*), (San Antonio*), Houston+, Dallas/Ft. Worth+, (Oklahoma City*), (Tulsa*), St. Louis+, Chicago, (Milwaukee*), (Little Rock*), (Memphis*), (Nashville*), (Knoxville*), (Charleston-Dumbar*), (Louisville*), (Cincinnati*), (Dayton*), (Columbus*), Cleveland+, Pittsburgh+, Washington/Baltimore+, (Wilmington*), Philadelphia, New York, (Hartford-Springfield*), (Providence*), Boston+, Detroit+, Buffalo/N.F.+, (Rochester*), (Syracuse*), (Albany*), (Indianapolis*)
16974	TWA	Los Angeles, San Francisco, Boston+, New York+, Philadelphia+, Washington+, Detroit+, Chicago+, St. Louis+, Kansas City+, Pittsburgh+, Cleveland+, Atlanta+, Miami+, Denver+, Phoenix+, Seattle/Tacoma+, Portland+
17004	Braniff	New York, Miami, Chicago, Dallas, Houston (San Antonio*), Los Angeles, San Francisco/Oakland, Seattle, Washington+, Minneapolis/St. Paul+, St. Louis+, Atlanta+, New Orleans +, Denver+, San Diego+, Portland+
17018	United Airlines	San Francisco, Los Angeles, New York, Chicago, Seattle, Boston+, Buffalo+, Philadelphia+, Pittsburgh+, Washington+, Cleveland+,

		Detroit+, Kansas City+, New Orleans+, Houston+, Dallas+, Denver+ San Diego+, Portland+
17019	United Airlines	San Francisco, (Sacramento*), Los Angeles, San Diego, (Las Vegas*), (Grand Junction*), Denver, (Lincoln*), (Omaha*), Kansas City, (Des Moines*), (Cedar Rapids*), (Iowa City*), (Moline*), (Milwaukee*), Chicago, (South Bend*), (Ft. Wayne*), (Toledo*), Detroit, Cleveland, (Akron*), (Youngstown*), Pittsburgh, (Allentown*), (Bethlehem/Easton*), Philadelphia, New York, (Hartford*), (Springfield*), (Providence*), Washington, Boston, Dallas+, Houston+, New Orleans+, Buffalo+
17023	Pacific Northern Airlines	Seattle, Portland
17024	Delta Airlines	San Francisco, Los Angeles, San Diego
17025	Delta Airlines	San Francisco, Los Angeles, San Diego
17028	Seaboard World Airlines	New York, Boston, Philadelphia, Washington, Detroit, Chicago, Seattle.
17032	Pacific Airlines	San Francisco
17035	World Airlines	Seattle, Portland, San Francisco, Los Angeles
17038	Alaska Airlines	Seattle, Portland
17039	Northwest Airlines	Boston, New York, Philadelphia, Washington, Detroit, Chicago, Minneapolis/St. Paul, Houston, Dallas, Los Angeles, San Francisco, Portland, Seattle
17040	Northwest Airlines	Boston, New York, Philadelphia, Washington, Detroit, Chicago, Minneapolis/St. Paul, Houston,

		Dallas, Los Angeles, San Francisco, Portland, Seattle
17041	Northeast	Washington, Philadelphia, New York, Boston, (Hartford*), Buffalo, Cleveland, Detroit, Chicago, Minneapolis, Seattle, Denver, Los Angeles, San Francisco, Miami, (Tampa*), Atlanta, New Orleans, Houston, Dallas, (San Antonio*), San Diego+, Tacoma+, Kansas City+, Newark+, Phoenix+, Pittsburgh+, San Diego+, St. Louis+
17042	Western	Miami, Denver, Phoenix, Dallas, Houston, New Orleans, (Salt Lake City*), (Las Vegas*), Seattle, Portland, San Francisco, Los Angeles, San Diego, Chicago+, Cleveland+, Detroit+, Kansas City+, St. Louis+, Atlanta+, Miami+, Long Beach+
17043	Western Airlines	Minneapolis/St. Paul, Denver, Phoenix, Dallas, Houston, New Orleans (Salt Lake City*), (Las Vegas*), Seattle, Portland, San Francisco, Los Angeles, San Diego/Chicago+, Cleveland+, Detroit+, Kansas City+, St. Louis+
17052	National Airlines	Los Angeles, San Francisco, San Diego, Miami+, Atlanta+, New Orleans+, Dallas+, Houston+, Phoenix+, Portland+, Seattle+
17053	National Airlines	San Francisco, Los Angeles, San Diego, Miami+, Atlanta+, New Orleans+, Dallas+, Houston+, Phoenix+, Portland+, Seattle+
17133	Delta Airlines	San Francisco, Los Angeles, San Diego, Dallas, Houston, New Orleans, Atlanta (Tampa*), Miami
17134	Delta Airlines	San Francisco, Los Angeles, San Diego, Dallas, Houston, New Orleans, Atlanta, (Tampa*), Miami

IV

PROCEDURE WITH RESPECT TO JOINT APPENDIX

(a) The joint appendix shall consist of the stipulated certified transcript of record (see heading II, supra) and this stipulation. This stipulation shall be placed at the end of the certified record and shall be numbered consecutively therewith. All briefs shall cite the joint appendix by referring to the page number thereof "(J.A. ____)". The printed joint appendix may be filed after the briefs are filed. This paragraph (a) shall only be applicable if the motion to consolidate referred to in paragraph (b) below is denied by the Court.

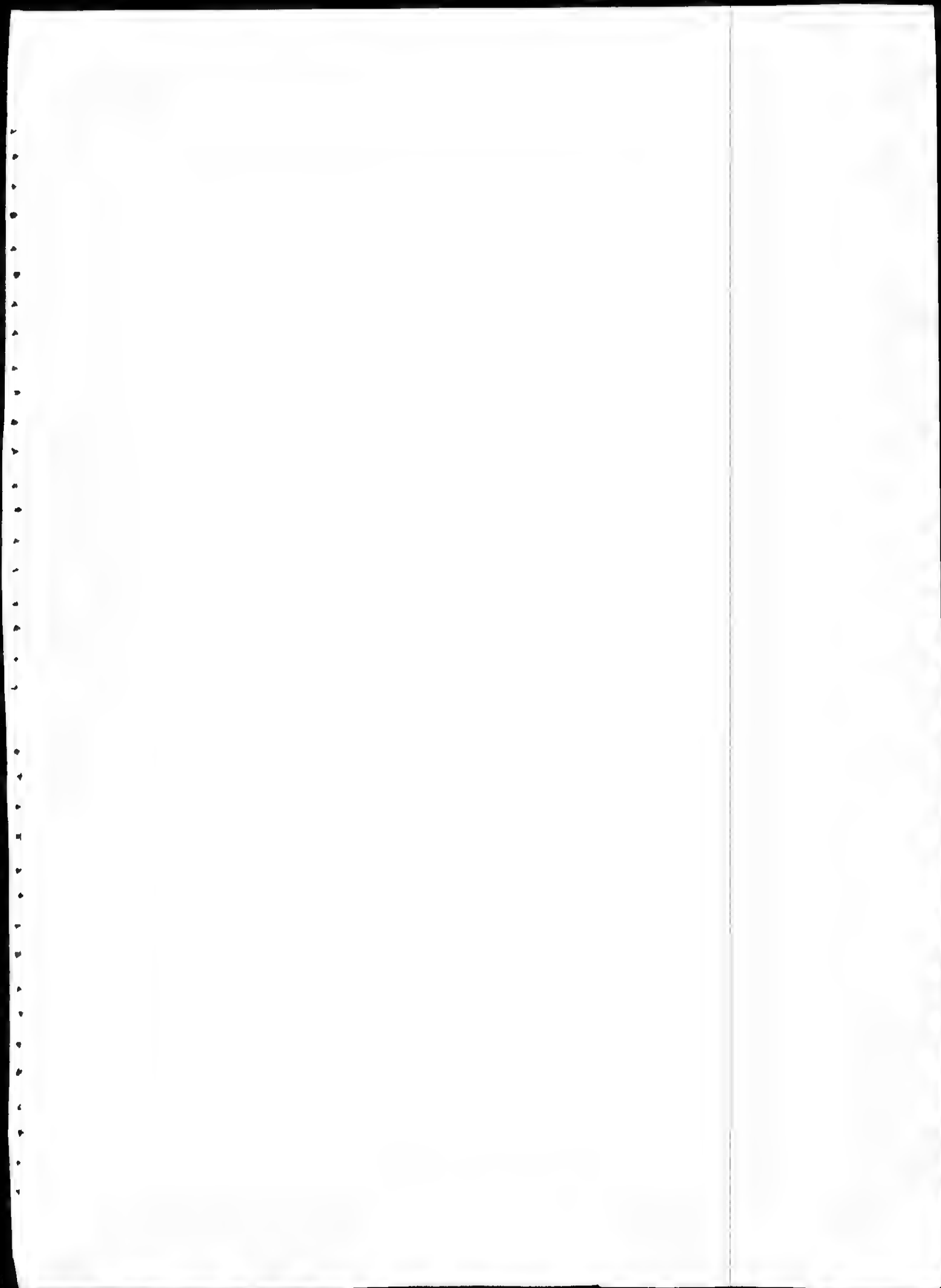
(b) The respondent has filed a motion to consolidate this case with City of San Antonio, et al. v. Civil Aeronautics Board, No. 20,383. Counsel for petitioners in both cases agreed to the motion to consolidate. In the event the cases are consolidated, all parties have agreed that there shall be a single joint appendix consisting of any document listed in either prehearing conference stipulation (heading II), arranged in chronological order, and followed by the prehearing conference stipulation in each case. The documents shall then be paginated according to their position in the joint appendix, and all briefs shall cite the joint appendix by referring to the page number thereof "(J.A. ____)".

We are authorized to state that counsel for petitioner in No. 20,383 agrees with this paragraph (b).

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Dated: October 4, 1966



OFFICE COPY

BRIEF FOR PETITIONERS
THE CITY OF SAN ANTONIO AND THE SAN ANTONIO CHAMBER OF COMMERCE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,383

CITY OF SAN ANTONIO et al.,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

On Petition for Review of Orders
of the Civil Aeronautics Board

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 24 1966

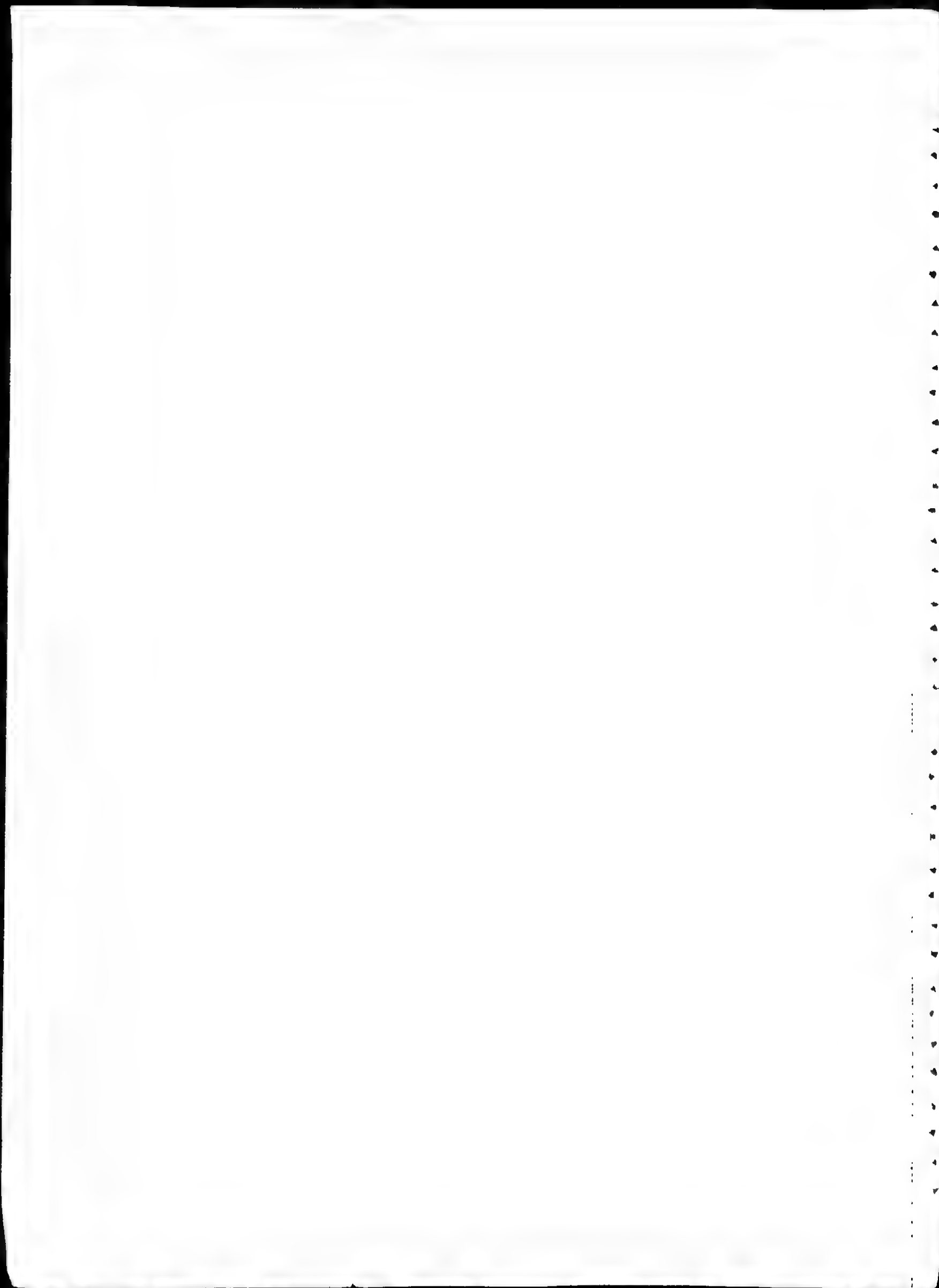
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STATEMENT OF QUESTIONS PRESENTED

The Civil Aeronautics Board held hearings on airline service between points in the United States and points in the Pacific Ocean and the Orient. Petitioners were granted leave to intervene in this proceeding. The Board terminated that proceeding without decision. Thereafter, the Board instituted a new international investigation of the same general scope with substantially the same issues.

The questions presented are:

1. When the Board named certain communities (which have competing interests with San Antonio) as potential mainland coterminal points, and did not include San Antonio, after appropriate request, did the Board act arbitrarily and deny San Antonio due process and essential fairness?

2. Did the Board err in denying San Antonio's petition for leave to intervene when the community showed a substantial interest in the proceeding?

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,383

CITY OF SAN ANTONIO et al.,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

On Petition for Review of Orders
of the Civil Aeronautics Board

BRIEF FOR PETITIONERS

JURISDICTIONAL STATEMENT

Your petitioners, the City of San Antonio and the San Antonio Chamber of Commerce, pray the Court to review and set aside certain orders of the Civil Aeronautics Board which have an adverse effect on San Antonio. The Court has jurisdiction of the case under Section 1006 of the Federal Aviation Act of 1958, as amended (72 Stat. 795; 49 U.S.C. 1486) and Section 10 of the Administrative Procedure Act (60 Stat. 243; 5 U.S.C. 1009). "Denial of the right to intervene founded on a claim of substantial interest is

immediately reviewable." City of Houston, Texas v. C.A.B.,
115 U.S. App. D.C. 94, 317 F 2d 158 (1963).

STATEMENT OF THE CASE

In Docket 7723, the Civil Aeronautics Board considered applications for certificates of public convenience and necessity for routes across the Pacific Ocean. The proceeding had two phases: (1) a "domestic" phase which was related to routes between Hawaii and United States mainland points, and (2) a "foreign and overseas" phase which covered service between the United States mainland and points in foreign countries. San Antonio was granted leave to intervene in the proceeding and participated as a party.^{1/} Thereafter the Board entered two pertinent orders in Docket 7723.

The first of these was Order E-22314. By this order the Board did two things. It terminated the "foreign and overseas" phase without awarding any transpacific routes. (J.A. 1)^{2/} Secondly, the Board reopened the "domestic" phase of the proceeding and instituted a new international

^{1/} A copy of the order granting intervention in Docket 7723 is attached to this brief as Appendix A. Petitioners will sometimes be referred to as "San Antonio" and the Civil Aeronautics Board as "the Board."

^{2/} J.A. refers to the Joint Appendix.

investigation which was entitled "Transpacific Route Investigation" and was assigned Docket 16242. (J.A. 1)

The second order (E-22995) terminated the so-called domestic phase of Docket 7723. (J.A. 5)^{3/}

The new Transpacific Route Investigation has the same scope and issues as the former proceeding. San Antonio duly and timely filed a petition for leave to intervene in the new Transpacific Route Investigation. (J.A. 9) A number of air carriers proposed direct transpacific service between San Antonio and points in Hawaii and foreign countries.^{4/} San Antonio alleged a sufficient interest to warrant intervention.

The Board then entered two pertinent orders in the new proceeding. The first of these was a "consolidation" order purporting to determine the scope of the proceeding. The general scope of the case was fixed to coincide with the issues in the old proceeding. The Board then decided that it would limit the consideration of mainland points to 25 cities

^{3/} The history of the first proceeding is contained in the opinions and orders of this Court in Western Airlines v. C.A.B., 122 U.S. App. D.C. 81; 351 F 2d 778 (1965).

^{4/} Among these were Continental Air Lines, American Airlines, Braniff Airways, and Northeast Airlines. (J.A. 156, 157, 169).

selected by it on what it asserted to be a reasonable balance of size, traffic and geography. The order named points such as Houston and Dallas -- cities with which San Antonio competes -- but it did not name San Antonio as a mainland point. It named cities larger than San Antonio and cities smaller than San Antonio. This is the first error.

The order provided a period of ten days for the air carrier applicants to conform their applications to the scope of the proceeding. (J.A. 13, 19) The applicants did so promptly, deleting San Antonio and other points not specifically named in the order from their applications. (J.A. 165-169) They had no alternative; if they did not conform their applications to the scope of the proceeding, they would not be applicants for routes within the scope of the case and would not be awarded any new routes.

The second pertinent order denied San Antonio's petition for leave to intervene. (J.A. 41)^{5/}

San Antonio duly petitioned for reconsideration of the orders which failed to name the city as a mainland point and denied its petition for leave to intervene. The petitions for reconsideration were denied. It is these orders of which review is sought.

^{5/} This order was issued by the Examiner under delegated authority pursuant to 14 C.F.R. Section 385.11 and later affirmed by the Board. (J.A. 142)

STATUTES, REGULATIONS AND RULES INVOLVED

The pertinent provisions of the Federal Aviation Act, the Administrative Procedure Act, and the Board's regulations to which references are made are set forth in Appendix D, or quoted in the appropriate place in the text.

STATEMENT OF POINTS

1. The Board discriminated against San Antonio by designating certain mainland points without including San Antonio, and acted arbitrarily and capriciously in designating mainland points.
2. The Board erred in failing to admit San Antonio as an intervenor for the reason that San Antonio has a substantial interest in the proposed new air services.

SUMMARY OF ARGUMENT

By naming certain points as the only mainland points to be considered in the proceeding, the Board prejudged the case and discriminated against San Antonio. It named as prospective points to receive new air service cities with which San Antonio competes and excluded San Antonio from the proceeding. The Board's action was arbitrary, capricious and contrary to statutory directives. The Board used the device of instituting an investigation instead of setting applications

for hearing, as required by the governing statute, and thereby forced the air carriers to apply for routes which did not include San Antonio.

The Board as a matter of fact concluded that San Antonio had no need for transpacific service in the foreseeable future. It reached this conclusion before it held the public hearing required by law, and before it had any record to support such a conclusion. At the same time, the Board denied San Antonio the right to be heard. This was error.

The Board used criteria to select mainland points which it failed to apply uniformly. There is no reasonable basis for the selection of mainland points, and no adequate explanation was given for its action in selecting certain points and excluding others. By failing to give adequate reasons for its order, the Board has frustrated San Antonio in its efforts to obtain judicial review. The Board failed to give reasons and sufficient explanation for its action, and thus prevented this Court from performing its task of judicial review.

In addition, the Board denied San Antonio the right to intervene in the proceeding although the Board admits that San Antonio has a substantial interest which warrants intervention.

For all of these reasons, the orders under review must be set aside.

ARGUMENT

I. THE BOARD DISCRIMINATED AGAINST SAN ANTONIO BY ARBITRARILY DESIGNATING CERTAIN MAINLAND POINTS WHICH DID NOT INCLUDE SAN ANTONIO.

In this day of competitive enterprise, communities as well as businesses are in competition with one another. In the search for sound industrial growth, for a broadened economic base, and a full development of potential, cities vie with one another to attract new industries, educational institutions, and commercial facilities. To obtain new business and to expand existing businesses, a city must offer, at a minimum, a skilled labor force, financial resources, and adequate transportation facilities. Today, adequate transportation facilities include adequate air transportation. The Civil Aeronautics Board is charged with the establishment and development of air transport routes to serve the cities of this nation. Its action in this respect can and does have a significant impact on the economy of the nation and the communities which comprise the nation's economy.

As a major city of the United States and the third largest city in Texas, San Antonio is in competition with other major cities of the United States, and, in particular

with its sister Texas cities of Dallas and Houston. Both of these latter cities were designated as mainland points but San Antonio was not. As a result, the Board is discriminating against San Antonio.

This Court has long recognized the existence of competition between cities, and it has been quick to note that a city is entitled to be heard on the issue of the discrimination it may suffer. Greensboro-High Point Air. A. v. Civil Aeronautics Bd., 97 U.S. App. D.C. 358, 231 F 2d 517 (1956); City of Houston, Texas, v. C.A.B., 115 U.S. App. D.C. 94, 317 F 2d 158 (1963).

San Antonio submitted its claim of discrimination to the Board; the Board rejected it without a hearing and without offering San Antonio an opportunity to be heard. The reasons for its actions in this respect are not clear, do not withstand analysis, and do not rest on a rational basis.

At the time this proceeding was instituted, there were pending before the Board applications by the air carriers which proposed transpacific service to San Antonio. Presumably an air carrier will not make application for a new route unless it has made some investigation of the need for the service, the probable traffic response, and the profitability of the service. Nevertheless, the Board designated 25

mainland points for consideration, excluding San Antonio from these points. The Board did not explain why it substituted its judgment for that of the air carriers.

According to its order, the Board selected these points on the basis of "the top 25 cities from the standpoint of population, with metropolitan area populations of 1 million or more, and rank in the top 25 mainland U. S. cities in terms of domestic passengers produced."

Section 401(b) of the Federal Aviation Act provides for the filing of an application for a certificate of public convenience and necessity by an applicant. Section 401(c) directs the Board to set such applications for public hearing and to dispose of them as speedily as possible. Instead of following the procedure prescribed in the statute, the Board, apparently dissatisfied with the applications before it, resorted to the fiction of instituting an investigation and inviting applicants to apply for certificates of public convenience and necessity within the predetermined scope of its investigation. The Board thus forced the applicants to conform to an arbitrarily-determined route pattern which discriminated against San Antonio.

The Board apparently made an arbitrary selection because it thought that "an indiscriminate approach could

produce a proceeding of unmanageable proportions and would delay our reconsideration of the transpacific route pattern" and "these are the cities which can, in fact, most realistically be related to foreseeable future service requirements." (J.A. 16) These are not adequate reasons and there is no sufficient explanation of how criteria were developed or applied.

A. The spectre of "unmanageable proportions" and "delay" does not exist.

The Board designated 25 mainland points. Three other communities have sought inclusion as mainland points. They are the petitioners in this consolidated case: San Antonio, Tampa, and Milwaukee.^{6/} It is evident that a proceeding with 28 cities is no less manageable than a proceeding with 25 cities.

The Board is quite capable of managing proceedings of considerable scope. In the Southern Transcontinental Service Case, there were 69 cities which appeared as intervenors.^{7/} The Board was able to handle that proceeding without

^{6/} While some other communities asked for inclusion as mainland points, there are only three which have appealed the denial of their applications. The decision as to the other cities has become final.

^{7/} Calculated from the list of appearances, Southern Transcontinental Service Case, 33 C.A.B. 701, at pages 702 and 770 (1961).

any undue delay. That case was instituted in March, 1958,^{8/}
and decided on March 31, 1961.^{9/} In the Great Lakes-
Southeast Service Case, the civic intervenors numbered 32.^{10/}

The argument of "unmanageable proportions" of a proceeding has often been advanced by administrative agencies and has been uniformly rejected by the Court. In a very similar case involving an intervention before the Federal Communications Commission, this Court held:

"The Commission's attitude in this case is ambivalent in the precise sense of that term. While attracted by the potential contribution of widespread public interest and participation in improving the quality of broadcasting, the Commission rejects effective public participation by invoking the oft-expressed fear that a 'host of parties' will descend upon it and render its dockets 'clogged' and 'unworkable.' The Commission resolves this ambivalence for itself by contending that in this renewal proceeding the viewpoint of the public was adequately represented since it fully considered the claims presented by Appellants even though denying them standing. It also points to the general procedures for public participation that are already available, such as the filing of complaints with the Commission, the practice of having local hearings, and the ability

^{8/} 33 C.A.B. 779.

^{9/} 33 C.A.B. 701. The Board has been considering transpacific routes since it instituted the earlier proceeding on May 15, 1959. 32 C.A.B. 978.

^{10/} Great Lakes-Southeast Service Case, 27 C.A.B. 829, 885 (1958).

of people who are not parties in interest to appear at hearings as witnesses. In light of the Commission's procedure in this case and its stated willingness to hear witnesses having complaints, it is difficult to see how a grant of formal standing would pose undue or insoluble problems for the Commission." 11/

In Philco Corporation v. Federal Communications
Com'n, 12/ this Court held that the Commission erred in failing to grant Philco standing as a party in interest. The decision was rendered over the strong dissent of Judge Madden who raised the point that the decision would permit many other parties to appear before the Commission and there should be some system whereby such prospective parties may be "safely fenced out." This Court refused to accept the spectre of a host of parties and held that the Commission should grant standing to the appellant. It should apply the rule of that decision to the case at bar.

The Board's claim of "unmanageable proportions" of the proceeding is inconsistent with its own orders. Under its rules of practice the Board admits participation by communities under either of two rules. Rule 15 is participation

11/ Office of Communication of United Church of Christ v. F.C.C., U.S. App. D.C., 359 F 2d 994, 1004 (1966).

12/ 103 U.S. App. D.C. 278, 257 F 2d 656 (1958),
cert. denied 358 US 946.

as a full party. Rule 14 permits a limited participation where a community may appear at the hearing and present any evidence which is relevant to the issues, and, with the consent of the Examiner, cross-examine witnesses.

The Board admits that San Antonio may participate under Rule 14. (J.A. 144) If this is so, then the length of the proceeding cannot be materially affected by designating San Antonio as a mainland point and admitting it to full participation as a party.

B. The Board was arbitrary in naming mainland points and gave no adequate reason for its action.

In selecting mainland points, the Board did not use any criteria with a reasonable basis in fact. The first test which the Board asserts it applied is that of a metropolitan population of one million or more, with minor exceptions necessitated by considerations of geographical balance. The Board does not explain why the figure of one million is a magic figure, and it is only possible to speculate on the reason for this cut off point. Likewise, the Board does not even bother to state how it determined metropolitan area population. Appendix B to this brief sets forth the metropolitan area populations of the 25 mainland cities and San Antonio. If the 1960 census data are used, the cities of Denver, New Orleans, Portland, and Phoenix have less than

one million population. If acceptable 1965 estimates are used, both Portland and Phoenix fall below the one million mark. Consequently, the population standard should not exclude San Antonio with a population of 816,000.

The second test used by the Board is said to be "traffic generating ability" in terms of domestic passengers produced. Each mainland point is supposed to be in the top 25 cities. Entirely apart from the fact that there is no basis for the use of the number 25 in passengers produced, the Board did not apply this criterion in any uniform manner. Portland ranks 27th and San Diego 28th in domestic passengers produced.^{13/}

Inasmuch as this is a transpacific case, it would seem that some attention should have been devoted to the international passengers generated by the cities. In terms of international passengers, San Antonio ranks 23rd, ahead of such designated mainland points as San Diego (25th), Buffalo (26th), Atlanta (28th), Kansas City (29th), and Phoenix (36th).^{13/}

The third, and last, criteria is supposed to be "geographic balance." These words are used but they are not

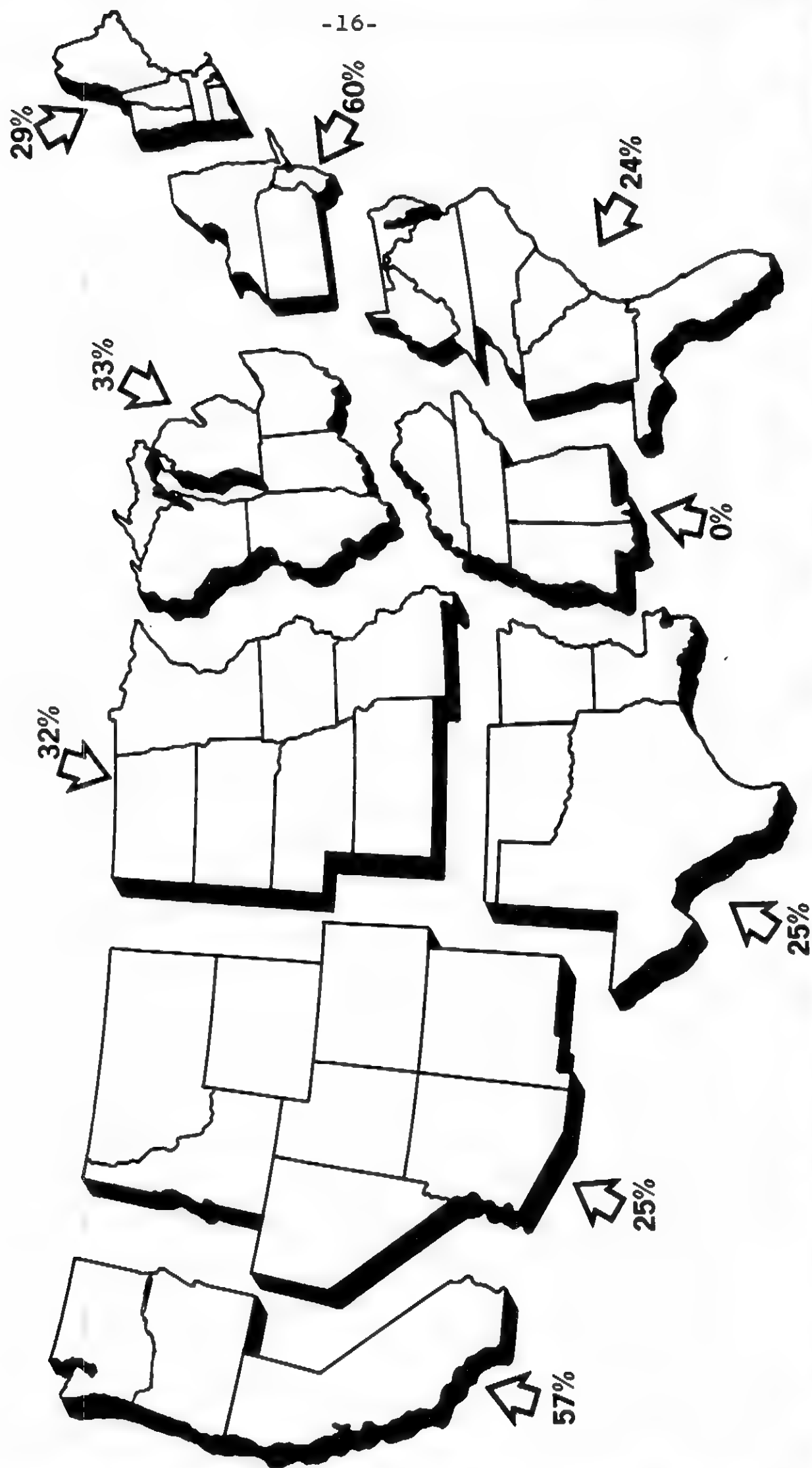
^{13/} Appendix B contains the data for each community.

explained. Assuming that they refer to a balance between certain areas of the country, there is no indication of what areas are considered or how their boundaries were delineated. The Bureau of the Census publishes statistics for population divisions. Each mainland city is, of course, located in one of the "population divisions" and the map on the following page shows these divisions. It also shows the incongruous result of the Board's arbitrary action. 60% of the Middle Atlantic population is included in mainland cities; none of the East South Central division is included. 57% of the population in the West Coast division is included, but only 25% of the West South Central is included.^{14/} If equality of geographic considerations was the aim of the Board, it failed to achieve its objective.

But, it is not for the petitioners nor for the Court to speculate on either the reasons why three criteria -- and only three criteria -- were used or how they were applied and the basis for variations. The Board is obligated to make the basis for its decision clear, and this it has failed to do.

^{14/} The calculations for each population division appear in Appendix C.

PERCENTAGE OF POPULATION COVERED BY MAINLAND POINTS IN STANDARD
U. S. CENSUS REGIONS AND GEOGRAPHIC DIVISIONS OF THE UNITED STATES



It is now well-established that an administrative agency must state clearly what it is doing and give the reasons for its action. "The administrative process will best be vindicated by clarity in its exercise." Phelps Dodge Corp. v. National Labor Rel. Bd., 313 US 177, 196-197 (1941). The general rule with respect to administrative agencies applies with equal force to the Civil Aeronautics Board. Braniff Airways v. C.A.B., 113 U.S. App. D.C. 132, 306 F 2d 739 (1962); Northeast Airlines v. C.A.B., 331 F 2d 529 (C.A. 1, 1964).

The Board has failed to give either the reason for its action or why it denied San Antonio's request for inclusion as a mainland point. In the absence of a sufficiently definite statement for its action, neither San Antonio nor this Court can test the validity of the Board's decision.

San Antonio claims that the Board discriminated against it by naming 25 competing cities as mainland points and not naming San Antonio as such. As this Court said in a case involving a similar issue of discrimination raised by a community,

"Despite these considerations, the fact remains that Greensboro has not received a plain answer to its charge of discrimination. We think it is entitled to one. The issue was flatly raised, and was relevant to the Board's ultimate decision..." 15/

15/ Greensboro-High Point Air. A. v. Civil Aeronautics Board, 97 U.S. App. D.C. 358, 231 F 2d 517 (1956).

It is submitted that San Antonio is entitled to a statement of reasons for the Board's action; otherwise its attempt to obtain judicial review is frustrated, and the discrimination cannot be removed.

C. The Board prejudged the case.

At the heart of the Board's order is its preconceived opinion and prejudgment with respect to the mainland points. The Board says with respect to the 25 designated cities, "These are the cities which can, in fact, most realistically be related to foreseeable future service requirements." (J.A. 16) Without taking any evidence, without any investigation (other than population and domestic air traffic data), the Board asserts, as a matter of fact, that these 25 cities are those which can be considered for service improvements in the foreseeable future. This is a finding to the effect that San Antonio has no foreseeable future requirement for service to Pacific points - a finding made before hearing, without consideration of relevant evidence, and without even giving San Antonio an opportunity to be heard. The Board does not even state what the "foreseeable future" is. Is it next year, or the next decade? The last Pacific case was instituted in 1959 and was terminated without decision. It may well be another seven years before the Board considers service requirements in the Pacific area.

A flat finding made as a matter of fact, before the public hearing required by statute, that only 25 cities can be realistically related to future service requirements is blatant prejudice of the proceeding.

D. It is important to a city to be designated a mainland point.

While the Board's orders are inconsistent, one proposition clearly emerges. If a city is named in a carrier's application and in the Board's order, its opportunities for improved service are enhanced. There are two types of service which constitute improvements in air service at San Antonio. These are nonstop flights and single-plane flights. The best possible service is nonstop. If a city is named as a mainland point on a carrier's route, it could receive nonstop service.^{16/} It can also receive single-plane service, i.e., a flight on which the San Antonio passenger stays on board the same airplane all the way to his destination. This is a superior service to changing airplanes or airlines en route.

Because of the Board's orders, the air carrier applicants deleted San Antonio from their applications for

^{16/} As a matter of technology, it is doubtful that any existing airplane could fly nonstop between San Antonio and Pacific points as distant as Tokyo or Hong Kong. However, existing aircraft can be flown nonstop between San Antonio and Hawaii -- one of the routes in issue in the proceeding before the Board.

new routes. Rule 302.930 of the Board's Rules of Practice provide:

"§302.930 Evidence in route proceedings.
(a) Route authority not specifically applied for. Applicants for certificate authority under Section 401 of the Act may not introduce, in support of awards to them of route authority, evidence which does not support service to the points, routes or areas specifically described in their applications pursuant to §201.4(c)(3) and (4) of this chapter."

Despite this rule of practice, the Board says in Order E-23741 that "no prejudice or injury should result to the petitioners in the civic category which are being denied formal party status." (J.A. 42) It is difficult to perceive how San Antonio is not prejudiced when the carriers may not present evidence of the manner in which they would serve San Antonio, if San Antonio were designated as a mainland point. To deny the carrier applicants the right to propose nonstop and through-plane schedules to San Antonio is to prejudice San Antonio in its efforts to be considered as a point for transpacific service.

In an obvious conflict with its own rule, the Board says, with respect to San Antonio and cities similarly situated,

"We are convinced that the petitioners' interest will be adequately represented through a combination of the air carrier parties, other community parties having an interest of their own, and their own participation under Rule 14 of the Board's Rules of Practice." (J.A. 144)

This statement cannot withstand analysis. Rule 930 prevents the air carrier parties from introducing evidence with respect to San Antonio.^{17/} Certainly, New Orleans, Houston, and Dallas are not going to make a case for San Antonio. They will be concerned with their own cases, and, engaged in inter-city strife will pay no attention to advancing the cause of San Antonio. It is naive for anyone to assume that in this proceeding any city will advance the cause of its competitor. If San Antonio is to be considered on its merits, it will have to be considered as a mainland point.

The Board also says that San Antonio may benefit by the certification of a carrier now serving San Antonio. The fact, however, is that the Board may award routes to carriers which do not serve San Antonio. Northeast Airlines, for example, originally proposed service to San Antonio as well as to Houston, Dallas, and New Orleans. To conform to the scope of the proceeding, it amended its application to delete San Antonio. (J.A. 169) If the Board certifies Northeast to serve Houston, it could not include service to

^{17/} The air carrier parties would not be willing to call San Antonio witnesses to present the case for San Antonio. They would be prevented from doing so by the Rules of Practice and the very practical matter of being placed in the position of preferring one city over another in a direct presentation.

San Antonio. The Board does not go so far as to assert that only carriers serving San Antonio will be selected for trans-pacific routes. The plain fact is that San Antonio is being discriminated against.

As a last resort, the Board retreats to the position that "the petitioning communities will, of course, have full opportunity under Rule 14 to urge the certification of carriers and gateway cities that would make possible single-carrier and single-plane service for them." This position is untenable. In the first place "full opportunity under Rule 14" does not permit the filing of motions, discovery procedure, or even a brief or oral argument to the Board and, therefore, is an empty phrase.

In the second place, why should San Antonio be relegated to a position of having to travel through a gateway? Why cannot it be the gateway? What the Board is really saying is that San Antonio can support the selection of Houston as a gateway, so San Antonio passengers can travel 200 miles east to board a plane to go west. San Antonio is not interested in traveling through other cities as gateways; it is interested in being in a position to become a gateway itself. It is strange logic that San Antonio can be given a full opportunity to be heard in this proceeding, when that opportunity is

limited to supporting service at some other city, and at a city with which San Antonio is competitive.

In the Houston case,^{18/} this Court held that competitive cities were entitled to equal rights; in this case San Antonio is entitled to equal treatment. San Antonio should be designated as a mainland point; at the very least, it is entitled to a rational explanation of the reasons for not so naming it.

II. THE BOARD ERRED IN DENYING SAN ANTONIO'S PETITION TO INTERVENE BECAUSE SAN ANTONIO HAS A SUBSTANTIAL INTEREST IN THE PROCEEDING SUFFICIENT TO ENTITLE IT TO BE AN INTERVENOR.

San Antonio was permitted to intervene in the first transpacific case. In the instant case, the Board admitted that San Antonio has an interest which warrants intervention. In the order denying intervention the Board said,

"Since the petitioning communities were not included among the mainland coterminal points designated by the Board in its order establishing the proceeding, no air carrier could receive authority in the case that would enable it to provide nonstop service between the petitioning communities and Hawaii or points beyond. On the other hand, since each of the petitioning communities is now named as a point on the existing domestic routes of one or more of the air carrier applicants, a grant

^{18/} City of Houston, Texas v. Civil Aeronautics Board, 115 U.S. App. D.C. 94, 317 F 2d 158 (1963).

of the application of a particular carrier in this case could make possible new single-carrier or single-plane service between the petitioning communities and points in the Pacific over a combination of the carrier's existing domestic route authority and new transpacific authority that might be granted it in the present proceeding, whereas the selection of some other carrier that lacks existing domestic authority to serve the petitioning communities would preclude such a result. This being so, it is apparent that the communities have an interest in the proceeding and, under other circumstances, would be granted leave by the Board to intervene. See Order E-20427, February 3, 1964." (J.A. 148) (emphasis supplied)

This admission by the Board, it is submitted, is sufficient proof that San Antonio has a substantial interest in the proceeding.

The only reason for denying intervention is that "the case will at best be large, complex, and time consuming, and the public interest requires that the Board make every effort to keep it within reasonable bounds." This reasoning is illogical and cannot be sustained. It has already been shown that the addition of San Antonio as a party to the proceeding will not unduly expand the case.

The Board cannot pick and choose between the applicants and the cities it will hear. The Board is bound by rules of law and rules of reason. It is unreasonable for the Board to say that it will hear Houston and Dallas -- which speak with a million tongues -- and will not hear

San Antonio which speaks with over 800,000 tongues. It is unfair for the Board to grant full intervention to Houston and Dallas and to deny competing San Antonio the same rights and opportunity to be heard.

Other cities will be given a full opportunity to participate in this proceeding while San Antonio would not. The economic injury and discrimination which San Antonio would suffer is clearly related to the subject matter of the proceeding before the Board. Under such circumstances fair play requires equal treatment. As pointed out in the dissenting opinion in Philco Corporation v. Federal Communications Commission, 103 U.S. App. D.C. 278, 257 F 2d 656 (1958), competing interests are permitted a fair field without favor. That opinion refers to conflicts between one radio station and another,^{19/} a consumer complaining of a producer of vitamins,^{20/} coal against gas,^{21/} and gas against oil.^{22/} Here, it is city against city. All your petitioners seek is equal footing with competing cities.

^{19/} Federal Communications Commission v. Sanders Brothers Radio Station, 309 US 470 (1940).

^{20/} Reade v. Ewing, 2 Cir. 1953, 205 F 2d 630.

^{21/} National Coal Ass'n v. Federal Power Commission, 89 U.S. App. D.C. 135, 191 F 2d 462 (1951).

^{22/} City of Pittsburgh v. Federal Power Commission, 99 U.S. App. D.C. 113, 237 F 2d 741 (1956).

This is no new problem before the Board or before the Court. Two recent cases decided by this Court make the error of the Board abundantly clear.

The first case is the Houston case.^{23/} In that case the Court said,

"Houston's interest is that of a municipality closely linked to another municipality with competing interests... In such a proceeding Houston has a substantial interest in presenting its side of the case in the proceeding. Essential fairness dictates this."

The second case is the Church of Christ case.^{24/} In that case the Commission refused to grant intervention to representatives of the listening public in a license renewal proceeding before the Federal Communications Commission. This Court held that the Commission "must allow standing to one or more of them as responsible representatives to assert and prove the claims they have urged in their petition." This Court pointed out that representative groups eligible to intervene might be such community organizations as civic associations which "tend to be representatives of broad as distinguished from narrow interests, public as distinguished from private or commercial interests."

^{23/} City of Houston, Texas v. Civil Aeronautics Board, 115 U.S. App. D.C. 94, 317 F 2d 158 (1963).

^{24/} Office of Communication of the United Church of Christ v. F.C.C., ____ U.S. App. D.C. ____, 359 F 2d 994 (1966).

Here the petitioners are the City of San Antonio and the San Antonio Chamber of Commerce, civic organizations which fit exactly into the category described by this Court as being representative of a broad, public interest.

In the Church of Christ case this Court said it would accord the administrative agency broad discretion in establishing and applying rules for public participation, but it would not condone the action of the Commission in denying any intervention whatsoever. The same result is required in the instant case.

CONCLUSION

The Board has discriminated against San Antonio by acting arbitrarily and capriciously. Its selection of mainland points was without reason and unsupported by any factual findings resting on evidence before the Board. Instead of hearing the applications of the carriers as provided by statute, the Board prejudged the proceeding and thereby discriminated against San Antonio and denied it an opportunity to be heard.

The Board has failed to provide a clear answer to San Antonio's charge of discrimination, and has failed to set forth adequate reasons for its actions.

The Board erred in denying San Antonio's request for intervention after it admitted that San Antonio has an interest which warrants intervention.

This is an important case to San Antonio, and the Board should not be permitted to discriminate against San Antonio.

For all of the reasons herein discussed, the orders under review must be set aside.

Respectfully submitted,

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Of Counsel

Dated: October 26, 1966

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 13th day of May, 1963

TRANSPACIFIC ROUTE CASE

:
:
:

Docket 7723 et al.

O R D E R

On May 3, 1963, the City of San Antonio, Tex., and San Antonio Chamber of Commerce filed a petition for reconsideration of Order E-19536, April 29, 1963. On May 6, 1963, the City of El Paso, Tex., El Paso Airport Board, and El Paso Chamber of Commerce filed a petition for reconsideration of Order E-19537, April 29, 1963.

Upon consideration of the matters presented in the petitions, the Board finds that the petitioners have shown good cause for their failure to move promptly to assert their interest in this proceeding following the Board's Order E-18429, June 8, 1962. Accordingly, the Board, in the exercise of its discretion, has decided to grant the requests of the petitioners for intervention.

ACCORDINGLY, IT IS ORDERED: That the City of San Antonio and the San Antonio Chamber of Commerce, and the City of El Paso, the El Paso Airport Board, and the El Paso Chamber of Commerce, be and they hereby are granted leave to intervene in this proceeding.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON

Secretary

(SEAL)

METROPOLITAN AREA POPULATION OF DESIGNATED
MAINLAND POINTS AND SAN ANTONIO

<u>Continental U. S. Cities</u>	Metropolitan Area Population (000)	
	<u>1960</u>	<u>1965</u>
New York/Newark	12,384	13,211
Los Angeles/Long Beach/ Burbank	6,743	6,918
Chicago	6,221	6,703
Philadelphia, Pa./ Camden, N. J.	4,343	4,719
Detroit	3,762	3,997
San Francisco/Oakland	2,783	3,030
Boston	2,589	3,236
Pittsburgh	2,405	2,428
St. Louis	2,060	2,277
Washington, D. C.	2,002	2,393
Cleveland	1,797	2,057
Baltimore	1,727	1,873
Dallas/Fort Worth	1,657	1,973
Minneapolis/St. Paul	1,482	1,623
Seattle/Tacoma	1,429	1,584
Buffalo/Niagara Falls	1,307	1,414
Miami/Fort Lauderdale	1,269	1,549
Houston	1,243	1,719
Kansas City	1,039	1,218
San Diego	1,033	1,202
Atlanta	1,017	1,189
Denver	929	1,116
New Orleans	868	1,018
Portland, Ore.	822	895
Phoenix	664	870
San Antonio	687	816
<u>Alaska/Hawaii Cities</u>		
Anchorage	122	136
Cold Bay	NA	NA
Fairbanks	13	NA
Honolulu	500	601
Hilo	26	26
Kahului	4	NA
Lihue	4	NA

ORIGINATION AND DESTINATION AIRLINE PASSENGERS
OF DESIGNATED MAINLAND POINTS AND SAN ANTONIO

<u>Continental U.S. Cities</u>	<u>Domestic O & D Passengers</u>				<u>International O & D Passengers</u>			
	<u>Rank</u>	<u>1960</u>	<u>Rank</u>	<u>1964</u>	<u>Rank</u>	<u>1960</u>	<u>Rank</u>	<u>1964</u>
New York/ Newark	1	10,003,490	1	14,239,280	1	1,346,274	1	1,835,904
Los Angeles/ Long Beach/ Burbank	3	4,476,560	3	6,567,690	3	298,170	2	520,416
Chicago	2	5,397,180	2	7,762,080	5	189,954	6	243,452
Philadelphia/ Camden, N.J.	9	1,762,280	9	2,620,410	10	63,090	9	178,262
Detroit	8	2,132,030	8	2,828,790	9	63,762	10	98,602
San Francisco/ Oakland	4	3,103,680	5	4,556,080	4	237,804	3	391,704
Boston	7	2,489,480	6	4,037,750	7	172,860	5	248,048
Pittsburgh	12	1,487,520	12	2,068,900	17	34,836	16	57,442
St. Louis	13	1,272,460	14	1,842,760	19	30,738	21	37,904
Washington, D. C.	5	2,947,870	4	4,638,370	8	126,480	8	189,298
Cleveland	10	1,638,900	11	2,186,510	14	40,890	15	61,778
Baltimore	31	563,710	22	1,104,460	20	27,744	11	72,990
Dallas/Fort Worth	11	1,547,550	10	2,318,130	18	34,038	19	48,084
Minneapolis/ St. Paul	15	1,168,340	15	1,721,330	13	44,682	13	68,360
Seattle/ Tacoma	16	1,075,410	18	1,424,810	6	179,424	7	242,476
Buffalo/ Niagara Falls	20	848,280	25	1,017,530	22	26,004	26	33,534
Miami/Fort Lauderdale	6	2,838,820	7	3,420,690	2	425,010	4	390,242
Houston	19	952,420	17	1,516,940	12	45,636	14	65,172
Kansas City	18	983,440	19	1,395,260	27	17,946	29	26,296
San Diego	28	597,480	28	855,290	30	16,476	25	33,944
Atlanta	14	1,233,570	13	1,981,360	29	16,680	28	26,466
Denver	17	1,043,520	16	1,566,040	23	24,630	20	38,798
New Orleans	23	729,400	21	1,130,790	15	37,746	18	49,280
Portland, Ore.	26	612,690	27	858,200	11	50,496	12	69,486
Phoenix	24	630,070	24	1,056,940	36	10,464	36	18,234
San Antonio	36	458,820	36	641,710	25	19,956	23	35,944

POPULATION AND GEOGRAPHIC COVERAGE OF STANDARD
BUREAU OF THE CENSUS POPULATION DIVISIONS

<u>Bureau of of Census Population Division</u>	<u>States</u>	<u>1965 Population (000)</u>	<u>Designated Mainland Points</u>	<u>1965 Metro. Area Population (000)</u>	<u>Percent of Division Total</u>
New England	Connecticut	2,848			
	Maine	990			
	Massachusetts	5,417	Boston	3,236	
	New Hampshire	657			
	Rhode Island	894			
	Vermont	397			
	Total	11,203		3,236	29%
Middle Atlantic	New Jersey	6,768	Newark	1,845	
	New York	17,982	Buffalo	1,414	
			New York	11,366	
	Pennsylvania	11,706	Philadelphia	4,719	
			Pittsburgh	2,428	
	Total	36,456		21,772	60%
East North Central	Illinois	10,695	Chicago	6,703	
	Indiana	4,952			
	Michigan	8,311	Detroit	3,997	
	Ohio	10,517	Cleveland	2,057	
	Wisconsin	4,243			
	Total	38,718		12,757	33%
West North Central	Iowa	2,821			
	Kansas	2,271			
	Minnesota	3,611	Minn./St. Paul	1,623	
	Missouri	4,509	Kansas City	1,218	
			St. Louis	2,277	
	Nebraska	1,474			
	North Dakota	646			
	South Dakota	708			
	Total	16,040		5,118	32%

POPULATION AND GEOGRAPHIC COVERAGE OF STANDARD
BUREAU OF THE CENSUS POPULATION DIVISIONS

<u>Bureau of the Census Population Division</u>	<u>States</u>	<u>1965 Population (000)</u>	<u>Designated Mainland Points</u>	<u>1965 Metro. Area Population (000)</u>	<u>Percent of Division Total</u>
South Atlantic	Delaware	510			
	District of Columbia	807	Washington	2,393	
	Maryland	3,549	Baltimore	1,873	
	Virginia	4,447			
	West Virginia	1,782			
	Florida	5,936	Miami/Fort Lauderdale	1,549	
	Georgia	4,289	Atlanta	1,189	
	North Carolina	4,876			
	South Carolina	2,555			
	Total	28,751		7,004	24%
East South Central	Alabama	3,450			
	Kentucky	3,138			
	Mississippi	2,282			
	Tennessee	3,812			
	Total	12,682			-
West South Central	Arkansas	1,906			
	Louisiana	3,565	New Orleans	1,018	
	Oklahoma	2,454			
	Texas	10,651	Dallas	1,332	
			Fort Worth	641	
			Houston	1,719	
	Total	18,576		4,710	25%

POPULATION AND GEOGRAPHIC COVERAGE OF STANDARD
BUREAU OF THE CENSUS POPULATION DIVISIONS

<u>Bureau of the Census Population Division</u>	<u>States</u>	<u>1965 Population (000)</u>	<u>Designated Mainland Points</u>	<u>1965 Metro. Area Population (000)</u>	<u>Percent of Division Total</u>
Mountain	Arizona	1,640	Phoenix	870	
	Colorado	2,013	Denver	1,116	
	Idaho	702			
	Montana	719			
	Nevada	435			
	New Mexico	1,046			
	Utah	1,008			
	Wyoming	352			
	Total	7,915		1,986	25%
Pacific Continental U.S.	California	18,880	Los Angeles/		
			Long Beach	6,918	
			San Diego	1,202	
			San Francisco/Oakland	3,030	
	Oregon	1,922	Portland	895	
	Washington	3,067	Seattle	1,231	
			Tacoma	353	
Alaska/ Hawaii	Alaska	253	Anchorage	136	
			Cold Bay	NA	
			Fairbanks	64	
	Hawaii	734	Hilo	60	
			Honolulu	601	
			Kahului	27	
			Lihue	46	
	Total	24,856		14,563	59%

Source: Sales Management Survey of Buying Power
Bureau of Census, U. S. Census of Population -
1960, U. S. Summary; C.A.B. Orders No. E-23740,
23910, 23989, 24087.

Pertinent Statutes

Administrative Procedure Act:

"Sec. 10 /5 U.S.C. 1009/. Judicial Review of Agency Action.

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

"Rights of review

"(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"Form and venue of proceedings

"(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments, or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

"Acts reviewable

"(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

"Relief pending review

"(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

"Scope of review

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

Federal Aviation Act of 1958, as Amended:

"Sec. 401(b) /49 U.S.C. 1371/. Application for Certificate.

"Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require."

"Sec. 401(c) /49 U.S.C. 1371/. Notice of Application.

"Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible."

"Sec. 404(b) /49 U.S.C. 484(b)/. Discrimination.

"No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

"Sec. 1006 /49 U.S.C. 646/. Judicial Review.

"(a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

"(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

"(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court, and the Board or Administrator shall thereupon file in the court the record, if any, upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code.

"(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole

or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

"(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

"(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of title 28, United States Code."

Civil Aeronautics Board Procedural Regulations, 14 C.F.R. 302:

"Sec. 302.14 Participation in hearing cases by persons not parties. (a) Requests for expedition. In any case to which the Board's principles of practice, Part 300, are applicable, any interested person, including any State, subdivision thereof, State aviation commission, or other public body, may by motion request expedition of such case or file an answer in support of

or in opposition to such motions. Such motions and answers shall be served as provided in section 302.8 hereof.

"(b) Participation in hearings. Any person, including any State, subdivision thereof, State aviation commission, or other public body, may appear at any hearing, other than in an enforcement proceeding, and present any evidence which is relevant to the issues. With the consent of the Examiner or the Board, if the hearing is held by the Board, such person may also cross-examine witnesses directly. Such persons may also present to the examiner a written statement on the issues involved in the proceeding. Such written statements, or protests or memoranda in opposition or support where permitted by statute, shall be filed and served on all parties prior to the close of the hearing."

"Sec. 302.15 Formal intervention.

"(a) Who may intervene. (1) Any person who has a statutory right to be made a party to a proceeding shall be permitted to intervene therein.

"(2) Any person whose intervention will be conducive to the ends of justice and will not unduly impede the conduct of the Board's business may be permitted to intervene in any proceeding.

"(b) Considerations relevant to determination of petition to intervene. In passing upon a petition to intervene, the following factors, among other things, will be considered:

(1) The nature of the petitioner's right under the statute to be made a party to the proceeding; (2) the nature and extent of the property, financial or other interest of the petitioner; (3) the effect of the order which may be entered in the proceeding on petitioner's interest; (4) the availability of other means whereby the petitioner's interest may be protected; (5) the extent to which petitioner's interest will be represented by existing parties; (6) the extent to which petitioner's participation may reasonably be expected to assist in the development of a sound record; and (7) the extent to which participation of the petitioner will broaden the issue or delay the proceeding.

"(c) Petition to intervene. (1) Contents. Any person desiring to intervene in a proceeding shall file a petition in conformity with this part setting forth the facts and reasons why he thinks he should be permitted to intervene. The petition should make specific reference to the factors set forth in paragraph (b) of this section.

"(2) Time for filing. Unless otherwise ordered by the Board, any petition for leave to intervene shall be filed within the following time limits:

"(i) In a proceeding where the Board issues a show cause order proposing fair and reasonable mail rates, such petition shall be filed within the time specified for filing notice of objection.

"(ii) In all other proceedings, including mail rate proceedings where no show cause order is issued, the petition shall be filed with the Board prior to the first prehearing conference, or, in the event that no such conference is to be held, not later than fifteen (15) days prior to the hearing.

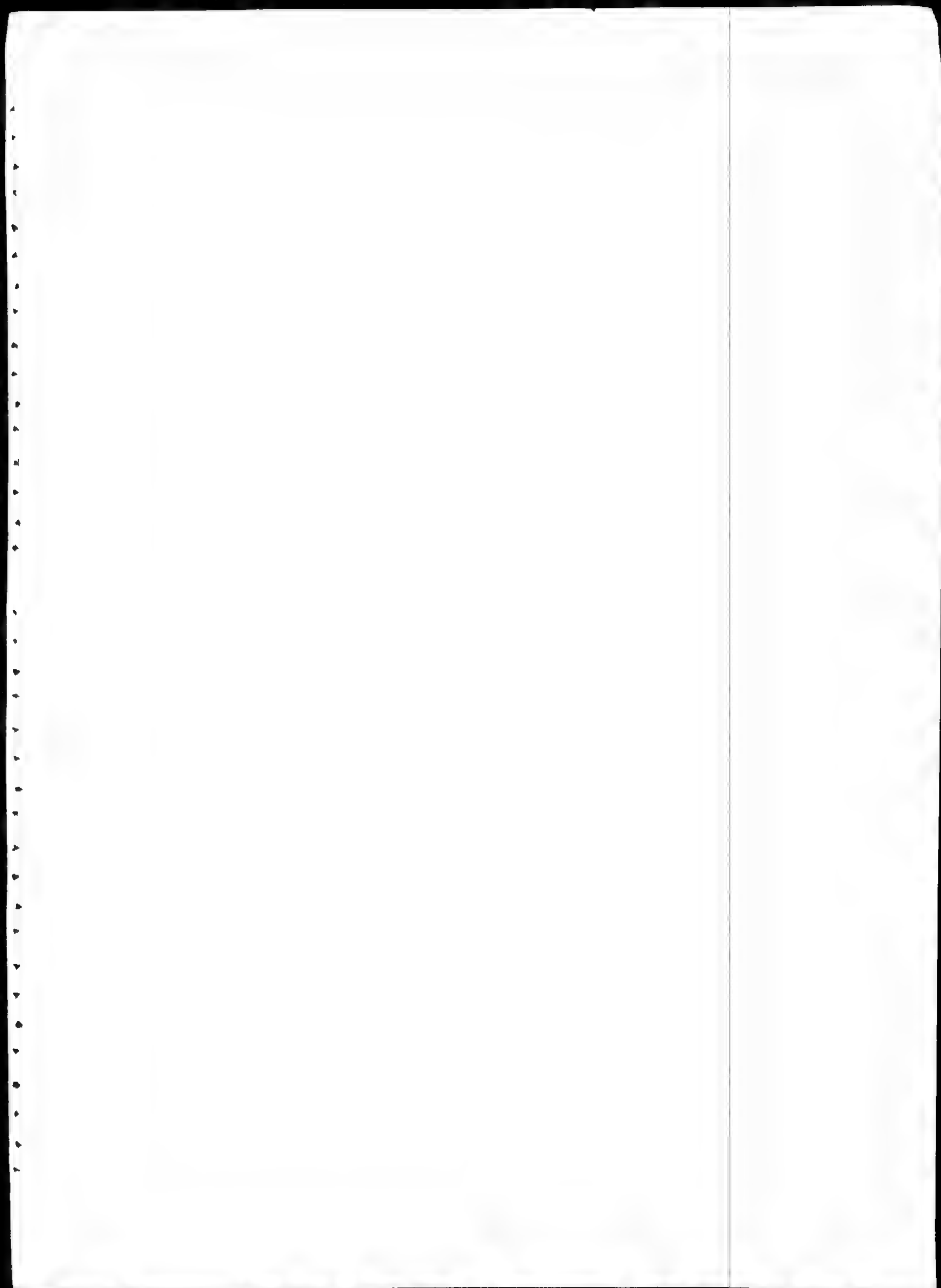
"(iii) A petition to intervene in any Board proceeding filed by a city, other public body, or a chamber of commerce shall be filed with the Board not later than the last day prior to the beginning of the hearing thereon. A petition for leave to intervene which is not timely filed shall be dismissed unless the petitioner shall clearly show good cause for his failure to file such petition on time.

"(3) Answer. Any party to a proceeding may file an answer to a petition to intervene, making specific reference to the factors set forth in paragraph (b) of this section, within seven (7) days after the petition is filed.

"(4) Disposition. The decision granting, denying or otherwise ruling on any petition to intervene may be issued without receiving testimony or oral argument either from the petitioner or other parties to the proceeding.

"(d) Effect of granting intervention. A person permitted to intervene in a proceeding thereby becomes a party to the proceeding. However, interventions provided for in this section are for administrative purposes only, and no decision

granting leave to intervene shall be deemed to constitute an expression by the Board that the intervening party has such a substantial interest in the order that is to be entered in the proceeding as will entitle it to judicial review of such order."



FOR BINDING

REPLY BRIEF FOR PETITIONERS
THE CITY OF SAN ANTONIO AND THE SAN ANTONIO CHAMBER OF COMMERCE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,383

CITY OF SAN ANTONIO et al.,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

On Petition for Review of Orders
of the Civil Aeronautics Board

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 6 1966

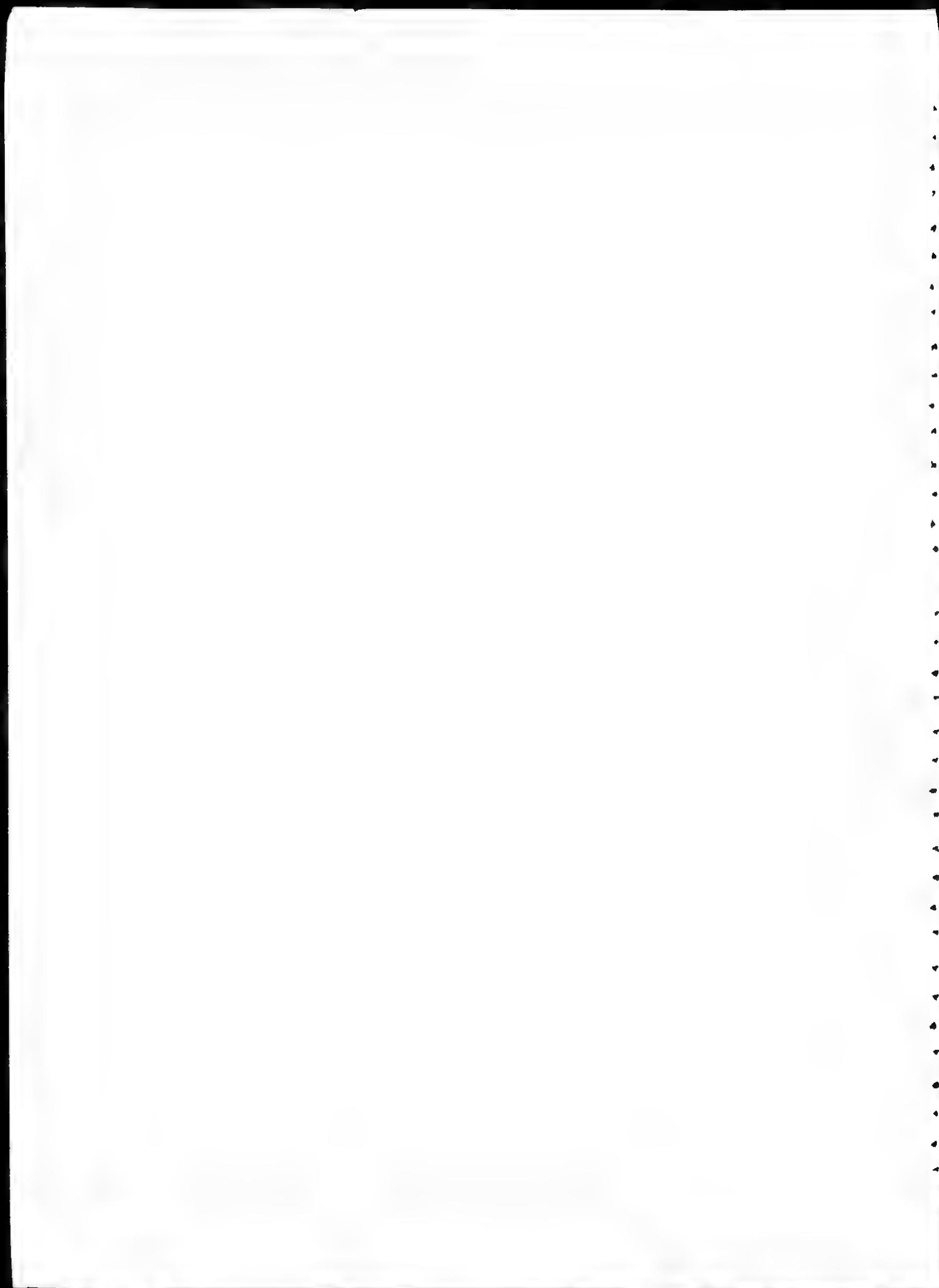
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Clerk

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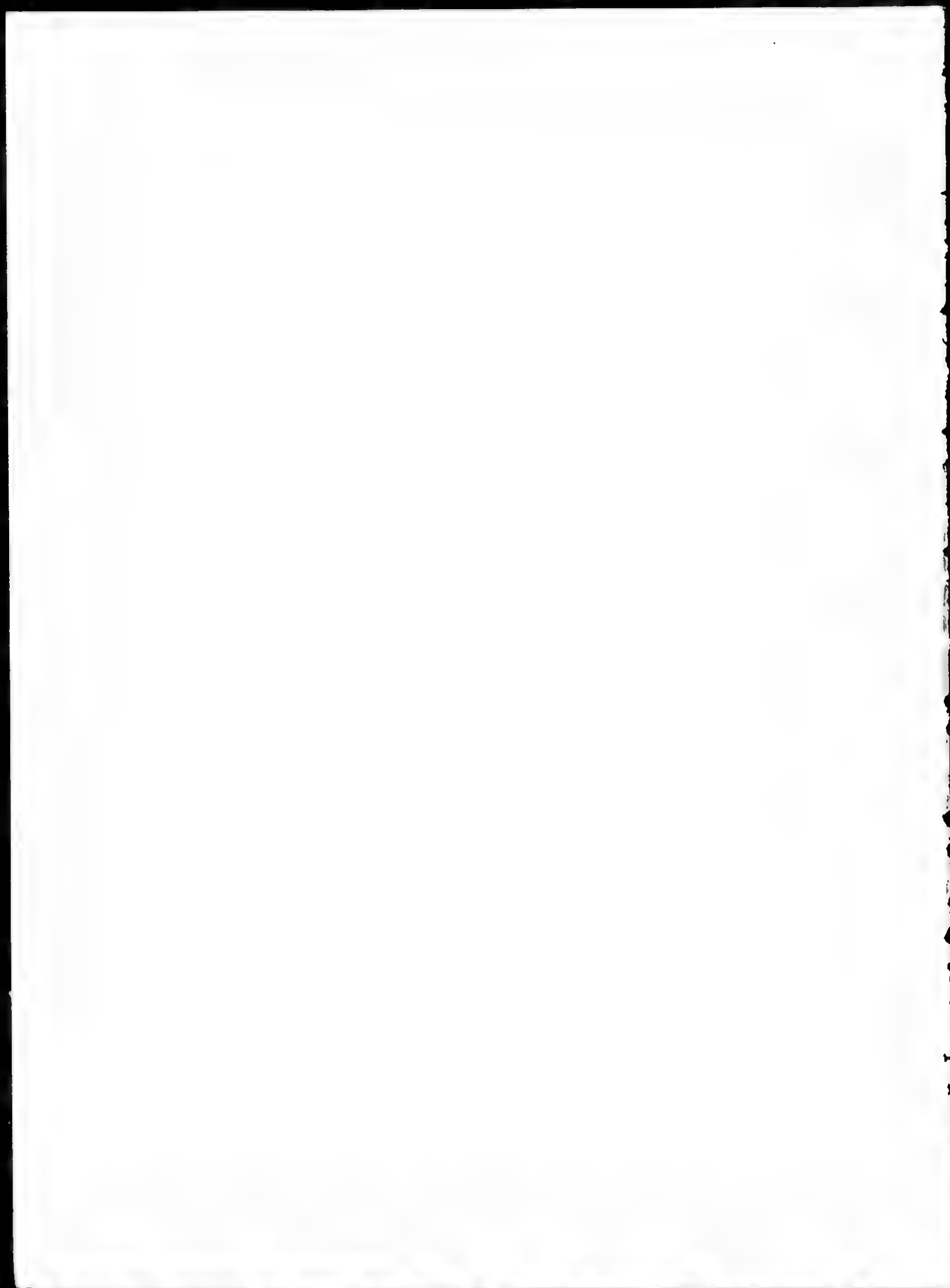
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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,383

CITY OF SAN ANTONIO et al.,
Petitioners,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

On Petition for Review of Orders
of the Civil Aeronautics Board

REPLY BRIEF FOR PETITIONERS

In this reply brief the Civil Aeronautics Board will be referred to as the "Board" and its brief will be referred to as "respondent's brief."

In this case, the Board denied San Antonio the right to be considered as a mainland point and denied it the right to participate as an intervenor. Respondent's brief attempts to justify this action by reference to cases which are not in point and by pious hopes and generalities which are demonstrably incorrect.

I. THE CASES RELIED ON IN RESPONDENT'S BRIEF
ARE CLEARLY INAPPLICABLE TO THE CASE AT
BAR.

Respondent's brief relies upon cases which do not go to the point at issue. The Eastern cases, which are chiefly relied on, involved entirely different issues. Two of them ^{1/} were concerned with the Board's power to limit the geographic area of a proceeding when Ashbacker contentions were presented. ^{2/} But those cases involved routes applied for which went beyond the geographic area of the Board proceeding, such as service to Minneapolis and Seattle when the case concerned only points in the general area between Chicago and Miami. (243 F 2d 608-609) There is no issue of geographic scope in the case now before the Court. San Antonio lies between Houston and Phoenix, and it is clearly within the geographic area of the case. Therefore, the "geographic area" cases cited by respondent's brief are not applicable here.

1/ Eastern Air Lines v. Civil Aeronautics Board, 100 U.S. App. D. C. 184, 243 F 2d 607 (1956) and Eastern Air Lines v. Civil Aeronautics Board, 271 F 2d 752 (C.A. 2, 1959), cert. denied 362 US 970.

2/ For an explanation of the Ashbacker rule in Civil Aeronautics Board proceedings, see Western Air Lines v. Civil Aeronautics Board, 184 F 2d 545 (C.A. 9, 1950).

The third Eastern case^{3/} decided only that an application for trunkline service need not be consolidated with applications for local air service. That case is likewise inapplicable. San Antonio is not asking that it receive a different type of air service than that proposed to other communities; it is merely asking for the right to be considered for the same type of air service which is proposed for other cities with which it competes.

Respondent's brief also cites Western Air Lines v. Civil Aeronautics Board, 184 F 2d 545 (C.A. 9, 1950). In that case, the Court said (184 F 2d 551):

"In our opinion, there has been as yet no effectual disposition of Western's rights to a hearing on any of its applications now pending before the Board."

In the case now before the Court, the Board's orders do effectively prevent San Antonio from participating in the proceeding.

Lastly, respondent's brief cites the Frontier case.^{4/} In that case Frontier was an applicant for a route

^{3/} Eastern Air Lines v. Civil Aeronautics Board, 85 U.S. App. D.C. 412, 178 F 2d 726 (1949).

^{4/} Frontier Airlines, Inc. v. Civil Aeronautics Board, 349 F 2d 587 (C.A. 10, 1965).

and its application was heard by the Board. That case involved the issue of whether another -- and different application -- should be heard at the same time. In the instant case, San Antonio is being kept out of the proceeding before the Board, and not even permitted to intervene. None of the cases chiefly relied on by respondent's brief are in any way applicable here. The facts are so different that no precedent value can be attached to the cases cited in respondent's brief.

II. RESPONDENT'S BRIEF CONTAINS ERRORS
OF FACT AND ERRONEOUS ASSUMPTIONS.

San Antonio pointed out in its opening brief that the Board granted San Antonio leave to intervene in the original Transpacific proceeding. Respondent's brief (p. 9) admits that San Antonio has an interest in the case. Respondent's brief then states, "This interest, the Board said, was such that it would normally grant leave to intervene as a matter of discretion." ^{5/} These last five words do not appear in the Board's order (J.A. 143). These words are now supplied by respondent's brief. Even if the right to intervene rests upon discretion (which is not admitted) then that discretion must be

^{5/} All emphasis in quoted matter in this brief is supplied unless otherwise noted.

exercised in a fair and reasonable manner and cannot be used to deal Houston and Dallas into the proceeding and deal San Antonio out of it.

In a further effort to avoid the conclusion that San Antonio's interest warrants intervention in the new Transpacific proceeding as well as the old proceeding, respondent's brief (p. 11) claims that the new proceeding involves "different proposals and different issues." While there may be some new issues, the fact is that all of the issues in the old Transpacific proceeding are still present in the new proceeding. Those issues were sufficient to warrant intervention by San Antonio before, and they are sufficient to warrant intervention now.

The amazing statement is made at page 12 of respondent's brief that this is "not a case where 'two nearby communities are vying for authority that the public convenience may dictate be granted to only one of them.'" There is no way in which this statement can conceivably be accepted. Houston is vying with Dallas, both of which are in the case. Minneapolis-St. Paul is vying with Chicago; Seattle is vying with Los Angeles; Baltimore is vying with Washington; and Boston is vying with Philadelphia. There is no other reason for these communities to be in the proceeding.

San Antonio is likewise in a competitive position vis-a-vis other cities in the case. Dallas, Houston, and San Antonio are competing for international gateway status -- to Latin American and Europe as well as to transpacific points. San Antonio is competing for warehouses and outlets from Japanese and other Asiatic industries and ports. Direct air transportation plays a vital part in the complex competitive situation which faces San Antonio and other communities in their efforts to attract new companies and further develop existing business establishments.

The most appalling error in respondent's brief is the statement on page 46, which is: "In this respect San Antonio's position is the same as that of Houston and National Airlines, for example, which serves Houston, San Antonio, and the Pacific Gateways." The fact is that National Airlines does not serve San Antonio, although it does serve Houston. Consequently, National cannot be expected to advance a case for San Antonio. Apart from this error, respondent's brief admits that the interest of San Antonio is the same as that of Houston. What is Houston's interest? It is obtaining direct service between Houston and transpacific points. San Antonio's interest is "the same," i.e., obtaining direct single-carrier service between San

Antonio and transpacific points. It is naive to believe that San Antonio wants its service at Houston any more than Houston wants its service at San Antonio. Neither city wants to be forced to use the other's airport, and each is entitled to present its case to the Board. Under the Board's orders, Houston and Dallas are entitled to present their cases and San Antonio is excluded. Houston may be perfectly happy with the selection of National Airlines, which serves Houston; San Antonio would be completely unhappy.

Respondent's brief becomes even more incredible when it alleges (at page 46) that "Houston and National will undoubtedly present evidence relating to San Antonio's importance as a population center and traffic generator in support of their own cases." The exhibits of the parties have now been filed with the Board. National does not even mention San Antonio in its exhibits. Nowhere does any party point out the names or importance of the military installations at San Antonio, or that 12.18% of all military cargo originates in San Antonio, or that a traffic forecast for 1975 results in 637 persons a week traveling between San Antonio and the transpacific points involved in the proceeding. Such data would be presented and appropriate argument made, if San Antonio were allowed to participate in

the case. But no party except San Antonio will present and argue these propositions. Respondent's brief not only fails to justify the Board's action, it admits that San Antonio should be a party to the proceeding.

III. RESPONDENT'S BRIEF IS BASED ON AN
UNACCEPTABLE PREMISE.

The thrust of respondent's brief is that the Board can do no wrong; it can pick and choose; it can limit or expand its proceedings according to its own whims or its own convenience. This philosophy is indicated on page 15 when the brief claims there is no "logical way" of fixing precisely the scope of the case. When an administrative agency admits it is unable to act in a "logical way," then the courts must reverse the order of the agency. Northeast Airlines v. Civil Aeronautics Board, 331 F 2d 529 (C.A. 1, 1964).

The underlying philosophy of respondent's brief is further exemplified by the statement on page 12 that the designation of Houston, but not San Antonio, "may well increase its (San Antonio's) chances of obtaining improved service to the Pacific." This wishful thinking is a complete non sequitur. The way to increase San Antonio's chances for

improved service to the Pacific is for the Board to let San Antonio participate in the case, consider the evidence it presents, and listen to its arguments. Nothing short of this gives San Antonio an equal opportunity for a fair hearing.

Respondent's brief contends the Board has not prejudged the case. Yet at page 14 of its brief, to justify the Board's action, it is said, "It is self-evident that the public convenience and necessity is more likely to require service at larger population centers with high traffic generating records." In a particular case the public convenience and necessity may require service at smaller points. If San Antonio has a stronger community of interest with transpacific points than either Dallas or Houston, then service would be required at San Antonio, even though its population is slightly less. This is the reason which compels a public hearing. This issue cannot be resolved without reference to facts. Cases are not to be decided on what someone considers the result to be "more likely"; cases are to be decided on facts and data which show which services are really required by the public convenience and necessity. An informed judgment based on facts of record -- not a surmise -- must support an administrative decision.

Respondent's brief (p. 29) admits that it does not mean "in drawing the line, a determination to consider service at certain cities rather than others represents any decision that similar service at the other cities may not in fact be required by the public convenience and necessity." This language clearly indicates that San Antonio as well as Houston, Dallas, and Phoenix may have a requirement for air service. If so, each of the cities should be given an equal opportunity in this case. Essential fairness demands no less.

Respectfully submitted,

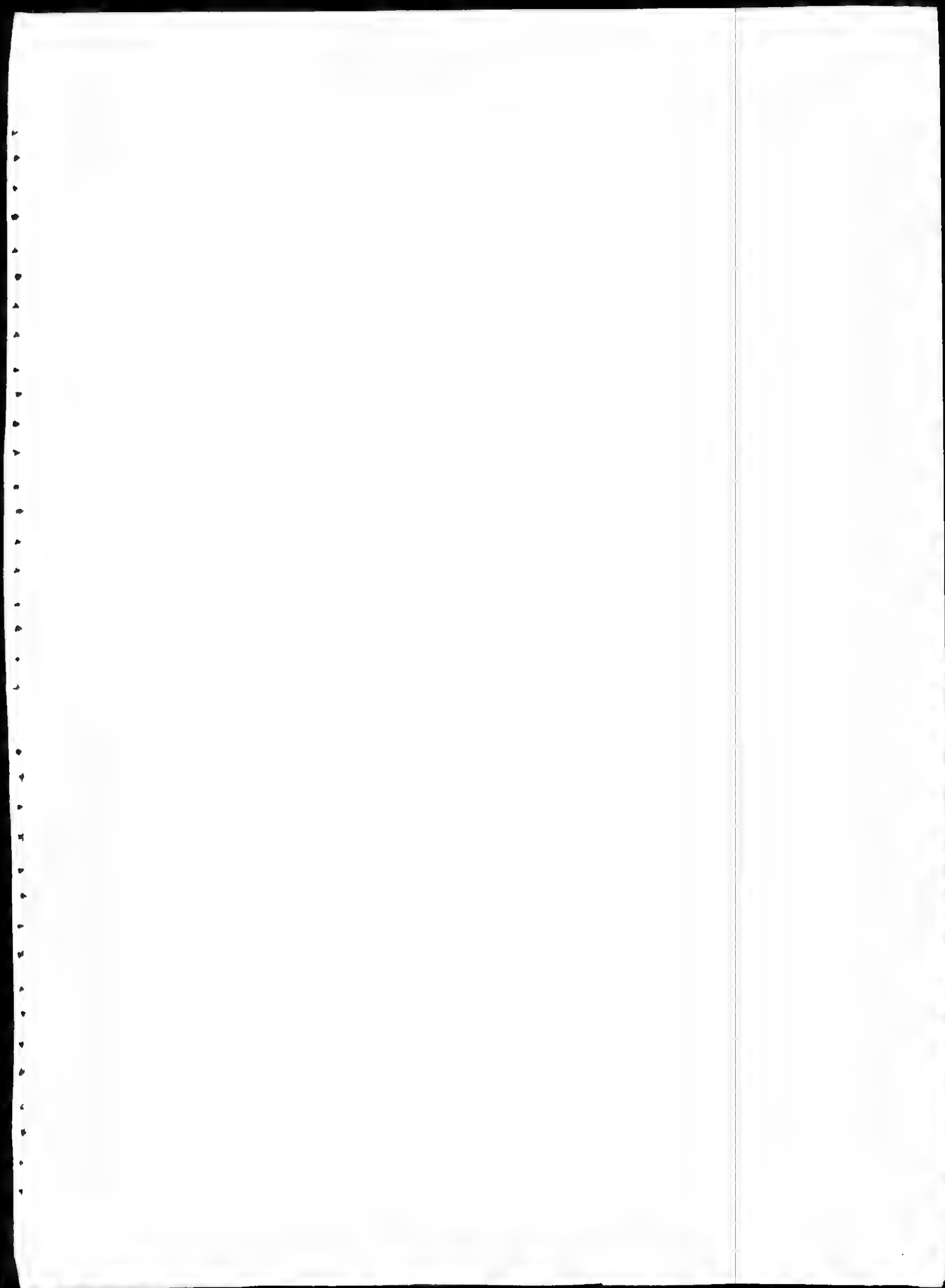
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Dated: December 6, 1966



FOR BINDING

BRIEF FOR RESPONDENT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,383

No. 20,464

No. 20,500

CITY OF SAN ANTONIO, ET AL.,
THE GREATER TAMPA CHAMBER OF COMMERCE, ET AL.,
STATE OF WISCONSIN,

Petitioners,

v.

United States Court of Appeals CIVIL AERONAUTICS BOARD,
for the District of Columbia Circuit

Respondent.

FILED NOV 29 1966

Nathan J. Paulson ON PETITIONS FOR REVIEW OF ORDERS
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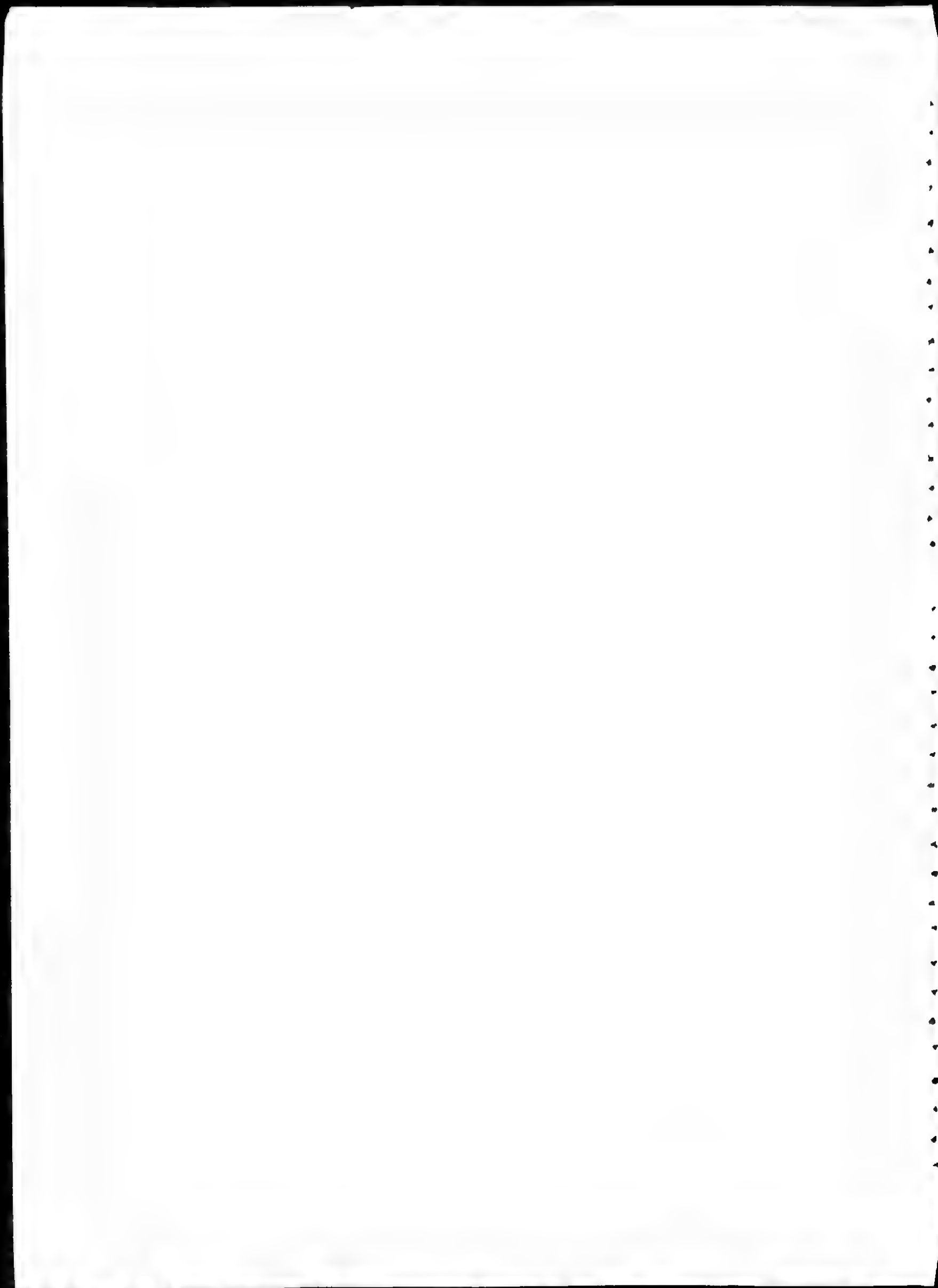
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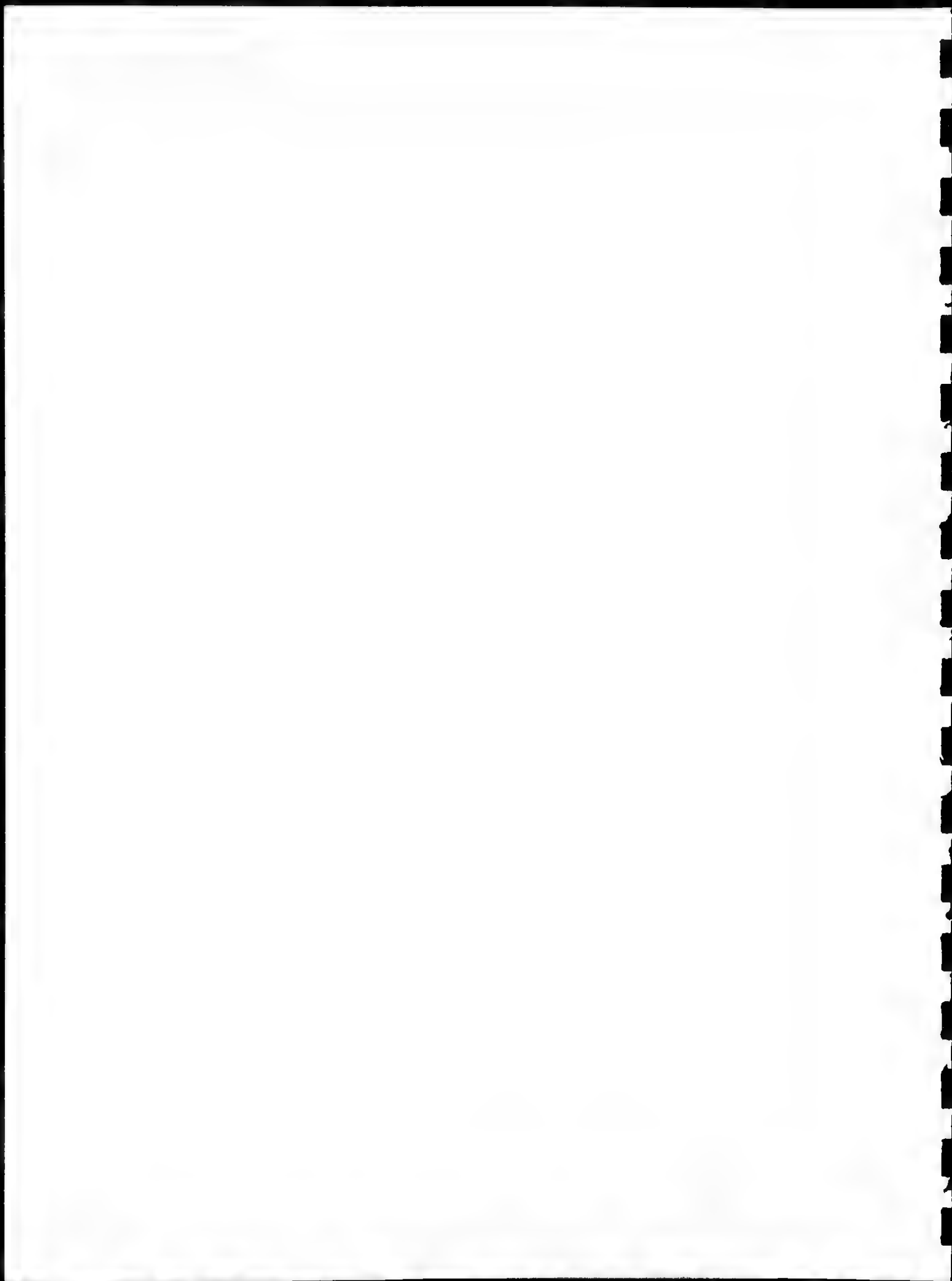
(i)

COUNTERSTATEMENT OF QUESTIONS PRESENTED

In respondent's view, the dispositive questions are:

1. Whether, in defining the scope of its inquiry into investigation into the possible need for new U.S. flag routes between the United States and the Pacific, the Board abused its discretion in confining the issues to service at 23 mainland points ("potential mainland coterminals") which did not include petitioners.

2. Whether, in limiting city intervention in the proceeding to those cities (and related governmental bodies and living groups) designated as potential mainland coterminals, the Board deprived petitioners of a "right" to intervene or sound its discretion.



(iii)

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IN THE
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CIVIL AERONAUTICS BOARD,

Respondent.

ON PETITIONS FOR REVIEW OF ORDERS
OF CIVIL AERONAUTICS BOARD

BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF THE CASE

Petitioners are the City of San Antonio, Texas, and its Chamber of Commerce (San Antonio), the City of Tampa, Florida, its Chamber of Commerce, and Hillsborough County, Florida (Tampa), and the State of Wisconsin (Wisconsin). They challenge Civil Aeronautics Board Orders E-23740 (J.A. 13) and E-23989 (J.A. 137), the so-called "consolidation orders" which defined the scope of the Transpacific Route Investigation, a new route proceeding "involving service between the United States mainland, on the one hand, and Hawaii and other areas of the Pacific . . . , on the other hand". (J.A. 13-14). In addition, petitioners attack Orders E-23741 (J.A. 41), E-23910 (J.A. 124), E-23990 (J.A. 142) and E-24082 (J.A. 152) by which their petitions for leave to intervene in the Transpacific case were denied. In general, the contentions are that the Board's decision to consider only 25 mainland points as possible coterminals^{1/} on new routes to the Pacific was arbitrary, discriminatory, and unsupported by adequate findings. Apart from the validity of the Board's definition of the issues, petitioners assert an interest in the proceeding entitling them to intervene, and hence they claim that the Board

^{1/} When two or more points are named as coterminals on a foreign air transportation route, the aircraft may be operated between such points but local traffic may not be carried (unless, of course, the carrier holds other authority to operate between the coterminals). For example, if New York, Chicago, and San Francisco were named as coterminals on a route to Tokyo, the carrier could operate a flight between New York and Chicago with New York-Tokyo passengers aboard, pick up Chicago-Tokyo passengers in Chicago, and proceed to San Francisco to board passengers from that city destined for Tokyo.

deprived them of their "rights" by confining civic intervention to cities designated as potential mainland terminals.

The general background of the Board's proceeding is well known to the Court as a result of litigation of several years duration involving an earlier transpacific proceeding.^{2/} That proceeding had been instituted to consider "the entire Pacific route complex".^{3/} Because of the President's disapproval, based on "considerations of foreign policy" (32 C.A.B. at p. 1008), of the major international awards recommended by the Board, and because of the interdependence of mainland-Hawaii service and international service, it was ultimately terminated without any significant awards.^{4/} This disposition of the prior case, however, was with the

^{2/} See, Western Air Lines v. Civil Aeronautics Board, 122 U.S. App. D.C. 81, 351 F.2d 778 (No. 18,305, 1965), and subsequent orders issued by the Court therein.

^{3/} Transpacific Route Case, 32 C.A.B. 928, 1034-5 (1961). As the filings in the Western case disclose the prior Board proceeding involved issues of service to the Pacific (both across the mid-Pacific to Hawaii and beyond, and over Great Circle routings) from a number of coterminals on the mainland -- specifically, the California gateways of Los Angeles and San Francisco, the Pacific Northwest cities of Portland and Seattle/Tacoma, and the Eastern and mid-Western points Boston, New York, Philadelphia, Baltimore, Washington, Detroit and Chicago. This was the so-called international phase of the case. Also included for consideration were proposals for new routes from the mainland to Hawaii (including San Diego-Hawaii service), the so-called domestic phase.

^{4/} The Board's recommended "international order" would have granted new operating authority to Northwest and Pan American between mainland points and points in the Pacific, including service between the Eastern and Midwestern coterminals, and Japan, on both a Great Circle route via Anchorage and a mid-Pacific route via Honolulu (32 C.A.B. at p. 1008). The domestic order would, among other things, have certificated Western Air Lines to operate between points in California and Honolulu (32 C.A.B. at p. 953).

intention, approved by the President, that a reexamination of the transpacific route pattern would be undertaken "at a suitable time in the near future" (Order E-20177, November 8, 1963).

It was to undertake the promised reexamination that the present proceeding was instituted. Like the old case, it would in general "be the vehicle for considering proposals involving service between the U.S. mainland, on the one hand, and Hawaii and other areas of the Pacific to be served directly or through Hawaii, on the other hand" (J.A. 14). As in the original case, the investigation encompassed both mainland-Hawaii service and service to points beyond Hawaii because of the Board's prior determination, affirmed by this Court in Western, that domestic and international transportation requirements in the Pacific are so interrelated that they cannot be separately considered.^{5/} The principal difficulty in further defining the scope of the proceeding, the Board said, concerned the points on the mainland "to be considered for direct transpacific service" (J.A. 14). The Board found that applications proposing service from the coterminals considered in the original proceeding should again be considered (J.A. 14). Moreover, in recognition of "the marked upsurge in traffic" subsequent to termination of the original proceeding, and "the ever-increasing economy, efficiency, and range of jet aircraft," the Board found that "it should expand

^{5/} Thus, contrary to Tampa's suggestion (Br., p 19), the Board had no alternative but to include issues of mainland-Hawaii service, notwithstanding that this will contribute to the complexity of the proceeding.

substantially the U.S. mainland points to be considered for the authorization of direct Pacific service" (J.A. 15), i.e., nonstop service to Hawaii and beyond.^{6/} It found, however, that many of the applications for which consolidation had been sought "request[ed] authority to operate in the Pacific from almost every major traffic generating city in the United States". For example, the Board noted, "American . . . would have the Board consider authorizing service from its domestic routes 4, 7, and 25, which serve over 40 cities, to Hawaii and beyond." (J.A. 14-15). The Board found that to consolidate such applications "would produce a proceeding of virtually unlimited proportions" (J.A. 14) and "would seriously delay our re-examination of the transpacific route pattern, a matter which is deemed by the President and the Board to be one of high priority". (J.A. 15).

After weighing and balancing the various suggestions of the parties as to how the proceeding could be kept within manageable proportions, the Board determined to select cities for consideration as mainland coterminals "in a manner which gives due regard to their size, traffic generating capacity and geographical location" (J.A. 16).^{7/} Thus, "with minor exceptions necessitated by considerations of geographical balance, the cities selected are in the top 25 cities from the

^{6/} Tampa is mistaken in asserting that nonstop service to Pacific points is not technologically possible. According to widely published newspaper accounts, the first leg of the President's recent Asian trip was a nonstop hop from Washington to Honolulu.

^{7/} In general, these were the factors which the parties urged the Board to consider (J.A. 15).

standpoint of population, with metropolitan area populations of one million or more, and rank in the top 25 mainland U.S. cities in terms of domestic passengers produced" (ibid.). The potential eastern coterminals were to be the same as those considered in the original case (Boston, New York, Philadelphia, Baltimore and Washington) plus Buffalo/Niagara Falls and Pittsburgh. To provide coverage of the Middle West, the Board designated as potential coterminals those previously considered (Detroit and Chicago), and, in addition, Cleveland, Kansas City, Mo., Minneapolis/St. Paul and St. Louis.

Continuing with its specification of potential coterminal points, the Board said:

"Although cities in the South and South Central area have not previously been considered for direct service to and from the Pacific, the Board believes that the time has come when their needs should at least be explored. Atlanta and Miami are primary traffic and population centers in the South and the same is true as to Dallas, Houston and New Orleans in the South Central area. We have selected Phoenix as the representative city in the Southwest. While Phoenix is not as large as other cities selected from the standpoint of population, it develops a substantial volume of traffic and is an established air transportation hub in its particular region" (J.A. 16).

The remaining cities selected for consideration as possible coterminals were Denver for the Rocky Mountain area, in view of the fact that it is the "principal traffic generator" in that area, and the traditional California and Pacific Northwest gateways which had been considered in the original case (J.A. 16-17).

The Board concluded that the cities designated for consideration as coterminals would "produce a reasonable balance of size, traffic and

geography" (J.A. 17).^{8/} It also pointed out that "any carrier receiving an award herein may, of course, conduct operations in any permissible manner by combining the new authorization with previously existing authority" (J.A. 26). This was consistent with the usual rule in transportation law which permits tacking of separate operating authorizations, thus making possible a variety of services in addition to those specifically in issue in the case. For example, if the Board were to award authority in this case for a route between Tokyo and the coterminals New York and San Francisco, a flight conducted solely under such authority could operate only from one or both of those coterminals to Tokyo. If, however, the carrier receiving such an award already held authority to operate a New York-San Francisco route via intermediate points, it could, by combining the two authorizations, operate a New York-San Francisco-Tokyo flight via intermediate points on its domestic route, thus providing single-plane service between such intermediate points and Tokyo.

San Antonio (J.A. 47) and Tampa (J.A. 79), among others, petitioned for reconsideration, both seeking to be included for consideration as potential mainland terminals. By Order E-23989 (J.A. 137) their petitions were denied. The Board reaffirmed its view that "the standards used in selecting mainland coterminals, as well as the manner of their application", reflected a reasonable and valid exercise of judgment as to the scope of the proceeding. While sympathizing with the cities'

^{8/} A map depicting the Board's definition of the scope of the proceeding, insofar as service to the mainland is concerned, will be found at the end of this brief.

desires, it found itself "satisfied that any further expansion of this proceeding to include these petitioners or similarly situated cities would unduly complicate and delay the proceeding and is contrary to the public interest" (J.A. 138).

Meanwhile 70 petitions for leave to intervene in the proceeding had been filed (J.A. 41), including one by San Antonio. Acting under delegated authority (14 C.F.R. 385.11), the examiner issued Order E-23741 (J.A. 41) disposing of these petitions. Pointing out that the Board's definition of the scope of the proceeding reflected its "desire to give realistic consideration to possible present and future air service needs while, at the same time, keeping the proceeding within reasonable bounds," he concluded that "the same general considerations should govern formal participation by mainland cities and their representatives in this proceeding" (J.A. 42). Indeed, the examiner continued, even with formal participation limited to the cities designated as potential mainland coterminals, "the record to be developed will of necessity be large, complex, and time-consuming in preparation" and, "were other communities whose interests are more remote to be added, the cumulative net result would be a substantial burden upon the proceeding" (Ibid.). Accordingly, "considering the magnitude of the issues, the need for expedition, and the varying nature and extent of the petitioners' interests," he ruled that formal party status should be accorded only to those cities being considered for designation as coterminals.

The examiner found that no prejudice should result from his ruling to cities being denied intervention. "In view of the large number of

applicants and the wide geographical distribution of potential coterminals," he found that "their general interest in improved service for their particular areas can be adequately represented and developed by the formal participants", i.e., the carriers serving the excluded cities and the cities being considered as coterminals. Moreover, the examiner pointed out that under Rule 14, cities denied formal status were free to tender evidence or written statements of position concerning the issues in the proceeding (J.A. 43).^{9/} By Order E-23910 (J.A. 124) the examiner for the same reasons subsequently denied similar petitions for leave to intervene filed by Tampa and Wisconsin, among other civic applicants for intervention.

On petitions for discretionary review (14 C.F.R. 385.51), the Board affirmed the examiner's action (J.A. 142, 152). Although any award in the case would make possible nonstop service to the Pacific only from a city ultimately certificated as a mainland terminal, the Board recognized that cities such as San Antonio, Tampa and Milwaukee (whose interests Wisconsin represented) had an interest in the case (J.A. 143):

" . . . since each of the petitioning communities is now named as a point on the existing domestic routes of one or more of the air carrier applicants, a grant of the application of a particular carrier in this case could make possible new single-carrier or single-plane service between the petitioning communities and points in the Pacific over a combination of the carrier's existing domestic route authority and new transpacific authority that might be granted it in the present proceeding, whereas the selection of some other

^{9/} 14 C.F.R. 302.14(b). Under Rule 14 persons other than formal parties may appear at a hearing and present any evidence which is relevant to the issues. Moreover, with the consent of the examiner, a Rule 14 participant may cross-examine witnesses. Such participants may also present to the examiner a written statement on the issues involved in the proceeding.

carrier that lacks existing domestic authority to serve the petitioning communities would preclude such a result."

This interest, the Board said, was such that it would normally grant leave to intervene as a matter of discretion. Nevertheless it was constrained to deny intervention "under the circumstances of the present proceeding" (J.A. 143). Pointing to the necessity of keeping proceedings "within reasonable bounds", and to the fact that the present proceeding was already exceedingly complex, it stated:

"It is readily apparent that the petitioning communities are not peculiarly situated, but have an interest that is shared by virtually all other major cities of the United States that are now named as points on the domestic routes of one or more of the air carriers which have applications for transpacific authority consolidated into this proceeding. This being so, a grant of intervention to the petitioning communities would require the Board, as a matter of fairness, similarly to grant intervention to numerous other communities, with a resulting substantial increase in the number of parties, the size and complexity of the record, and the time that would be required to reach a decision in the case."

The Board agreed with the examiner that petitioners' interests would be adequately protected by other parties' participation and by their own participation under Rule 14. It found it "readily apparent" that carrier applicants presently serving the petitioners would be actively urging their own certification and would "support their cases with evidence on 'backup traffic' from points on existing domestic routes that could and would move via the gateway points over the new transpacific routes" (J.A. 144). Moreover, the Board said, cities designated as potential coterminals could reasonably be expected to make similar presentations and, like the examiner, the Board pointed out that petitioners would "have a full opportunity under Rule 14 to

urge the certification of carriers and gateway cities that would make possible single-carrier and single-plane service for them" (J.A. 144).

The Board rejected San Antonio's contention that it was entitled to intervention because it had been an intervenor in the original ^{10/}Transpacific case. It pointed out that this is a new proceeding, involving "different proposals and different issues, which, in turn, create different problems" (J.A. 144). It found that "the present proceeding is substantially larger and more complex than the prior proceeding" and hence that "the need to avoid any unnecessary expansion of the case is significantly greater" (J.A. 144). This was particularly important, the Board said, in view of "the interest of the traveling public and of the U.S. . . . flag carriers who seek adjustments of their routes to improve their competitive position against foreign flag operators", a factor which was found to make it "imperative . . . that the Board take all reasonable steps to insure the earliest possible disposition" of the case (J.A. 145).

Also rejected was San Antonio's claim of discrimination against it which, the Board found, "went not to its action on intervention, but to its determination . . . that Houston and Dallas should be included

^{10/} The so-called international phases of the original case had been terminated at the direction of the President pursuant to his powers under Section 801 of the Act (49 U.S.C. 1461) and in Western, this Court directed the Board to take final action in the domestic phase. The Court later affirmed the Board's order "deny[ing] all applications, thus terminating the so-called domestic phase of the Transpacific Route Case . . ." (J.A. 8).

as possible coterminal points but San Antonio should not" (J.A. 145). Moreover, the Board found that this was not a case where "two nearby carriers are vying for authority that the public convenience and necessity may dictate be granted to only one of them" (Ibid). On the contrary, the Board pointed out by way of example that certification of a carrier serving Houston and the designation of Houston as a coterminal point, "far from prejudicing San Antonio may well increase its chances of obtaining improved service to the Pacific" (J.A. 145).^{11/}

STATUTES AND REGULATIONS INVOLVED

The provisions of the Federal Aviation Act and of the Board's regulations are set forth in the Appendix, infra, pp. 49-52 .

SUMMARY OF ARGUMENT

I

There is no ambiguity in the scope of the issues as defined by the consolidation order. The only possible awards to be made are for routes between the Pacific and the points designated as potential coterminals. In accordance with the usual rule, however, and as the Board specifically said, a carrier receiving an award could combine

^{11/} San Antonio is 192 miles west of Houston and lies on American's and Continental's routes between Houston and the California gateways. The two cities are also connected by Braniff and Eastern, both applicants in the case.

A similar situation prevails in the cases of Milwaukee and Tampa. The former is 67 miles from Chicago and lies on Northwest's route from Chicago to Seattle and Portland, as well as on United's route from Chicago to all Pacific gateways. Tampa is 204 miles northwest of Miami and is served on National's Miami-San Francisco route, Northwest's Miami-Seattle route, and Eastern's route from Miami to New Orleans and Houston.

the new authority with its existing authority, thus making possible new or improved single-carrier or single-plane service between the Pacific and mainland points on the carrier's existing routes other than those designated as potential coterminals.

In recognition of this principle, and with judicial approval, the applicants in new route proceedings normally present evidence relating to service benefits to points not specifically in issue in the case. While, it does not determine whether the public convenience and necessity require such service, the Board normally takes such service possibilities into consideration in deciding the case.

II

The Board cannot investigate the needs of all cities simultaneously. At the threshold of every major route proceeding, therefore, the Board limits the area or points whose needs are to be investigated, consolidating those applications or portions of applications which conform to the scope of the proceeding as defined. The courts have consistently held not only that the Board may, indeed must, limit the scope of its inquiry, but that in defining the scope of the investigation, the Board's discretion is exceptionally broad.

Had the Board permitted the scope of this proceeding to be determined merely by taking the carriers' applications as it found them, it would have been required to determine whether the public convenience and necessity require service between the Pacific and 72 separate points on the mainland. Obviously such a proceeding would have been exceedingly complex and, moreover, since many of the points named in the carriers'

applications have relatively light traffic potential, consideration of their possible needs would have been a waste of time.

It is incorrect to argue that inclusion of all points named in the carriers' applications would not complicate the case because the Board may in any event consider benefits to points which were not designated as coterminals but which are located on the applicants' existing routes. Where points are placed in issue in a route proceeding, all of the elements embodied in the public convenience and necessity concept must be considered and balanced to determine whether the point so needs air service that a carrier should be placed under a statutory duty to provide it. This is entirely different from merely taking into account the incidental benefits to another point which may result from certification of the point or points in issue.

The Board's limitation of the scope of the present proceeding was entirely reasonable and neither "prejudged" the needs of excluded points nor discriminated against them. It is self-evident that the public convenience and necessity is more likely to require service at larger population centers with high traffic generating records. The Board's order simply reflects a judgment that the possible needs of certain cities which, for the most part, had populations of 1 million or more and stood in the top 25 cities in terms of traffic generation were the most realistic and hence provided the most reasonable subject for investigation.

The Board's findings with respect to the scope of the proceeding are of the sort customarily made in consolidation orders and no more is required by the many judicial decisions affirming such orders. Petitioners'

contentions with respect to the findings rest in large part upon the erroneous assumption that such orders must contain detailed findings and reasons similar to those required for adjudicatory decisions on the merits. Neither the cases relied upon by petitioners nor the Administrative Procedure Act require such findings in consolidation and other procedural orders. On the contrary, no more is required than "a simple statement of procedural or other grounds". The Board's consolidation order goes far beyond this requirement. It stated in detail how and why it had established the scope of the proceeding. In view of the fact that a line had to be drawn and that there was no mathematical or logical way of fixing it precisely, no further elaboration was possible as a practical matter or necessary as a matter of law.

III

Contrary to petitioners' assumption, they have no statutory right to intervene in the Board's proceeding. Section 401(c) of the Federal Aviation Act provides simply that an "interested person" may participate in route proceedings to the extent of filing memoranda in support of, or in opposition to, certificate applications. Thus, any further participation is a matter of discretion for the Board and there is no showing that this discretion was arbitrarily exercised here.

Petitioners' interest in the Transpacific case is that they are located on the existing routes of one or more of the carrier applicants and hence could obtain new single-carrier or single-plane service to the Pacific depending upon which carriers are ultimately selected to receive any award found to be required by the public convenience and necessity.

As the Board stated, it would normally grant intervention to communities having such an interest. Here, however, all 11 trunklines in the national transportation system are applicants and there are hundreds of separate domestic points on the routes of these carriers. The interest of such points is no different in kind or degree from that asserted by petitioners and if the Board were obligated to grant intervention to them, it would have no alternative but to grant intervention to any other city on the routes of any of the applicants. Moreover, under Rule 14 of the Board's Procedural Regulations, petitioners may appear and offer evidence in support of the certification of nearby potential coterminals and the selection of carriers on whose routes the petitioners are located. Their interests are further protected by the fact that the carriers certificated to serve petitioners can be expected to support their cases for transpacific authority with evidence of backup traffic at points on their existing systems, including petitioners, and the benefits to such points which their certification would provide. In these circumstances the Board's denial of intervention to petitioners was not unreasonable.

City of Houston v. Civil Aeronautics Board, 115 U.S. App. D.C. 94, 317 F.2d 158 (1963) is readily distinguishable from this case. The interests of cities granted intervention, i.e., the potential mainland terminals, and those denied intervention are not, as in the City of Houston case, competing. On the contrary, they coincide.

ARGUMENT

Introduction

Two distinct questions are presented by these appeals. The first is whether the Board fell into legal error in defining the scope of its inquiry in the Transpacific Route Investigation, i.e., in determining that it would consider the possible requirements of the public convenience and necessity with respect to transpacific air transportation at a relatively limited number of mainland points which did not include San Antonio, Milwaukee, or Tampa. The other is whether, apart from the validity of the Board's definition of the issues, petitioners' interests in the proceeding were such that the Board was required, as a matter of law or discretion, to permit their intervention as formal parties. We will show that the Board necessarily has wide latitude in defining the scope of new route investigations and that its action here was well within the bounds of reasonableness. We will also show that the Board's ruling on the petitions for leave to intervene accorded petitioners all that the Act requires and more, and that it represented a reasonable accommodation between representation of the interests of third persons and the demands of orderly procedure in the light of the nature of the proceeding. Because it will facilitate discussion of these issues, however, we turn first to Tampa's contention that the Board's consolidation order is invalid because it "does not clearly state whether consideration of service to Tampa is in or out of the case" (Br., p. 9).

I. The Board's order is clear and unambiguous with respect to the issue of transpacific service at Tampa.

In spite of Tampa's professed inability to understand them, the Board's orders are perfectly clear and leave no doubt as to the scope of the issues to be considered in the proceeding. The consolidation order designates 25 mainland cities as potential coterminals on transpacific routes. This means that only those points will be considered for inclusion in any certificate to be awarded. As a result, service conducted solely pursuant to any award which may be made in the proceeding would be confined to service between the Pacific and such mainland terminals as may be included in the award.

It is equally clear that improved service to other mainland points could flow from any award which might be made. Indeed, the very purpose of the Board in designating one or more potential coterminals in each section of the country was to provide for consideration of terminals through which traffic from such sections might flow. Moreover, as previously indicated, in the absence of restrictions to the contrary, a carrier may combine its separate authorizations. Not only did the Board not impose any restriction which could preclude such combinations, but it specifically said that "any carrier receiving an award herein may, of course, conduct operations in any manner permissible by combining the new authorization with previously existing authority" (J.A. 26). Thus, for example, if National Airlines, which presently holds Miami-Tampa-San Francisco authority, were to receive an award in the instant case designating San Francisco as a terminal on a

transpacific route, it could operate a flight from Tampa to San Francisco and beyond to the Pacific.^{12/}

In recognition of this elementary principle, and as the Court is aware, the Board is not confined in certificate proceedings to consideration solely of service between the specific points or area at issue in the case. Rather, such proceedings invariably involve traffic from points on the applicant's existing routes to the new points sought. Moreover, the applicants rely upon these service possibilities in support of their applications and such "beyond area" or "backup" traffic is normally considered by the Board in fashioning new air routes. Frontier Airlines v. Civil Aeronautics Board, 104 U.S.App. D.C. 78, 259 F.2d 808 (1958). The Board does not of course determine whether the public convenience and necessity require service to the "beyond" points. Rather, in determining whether a particular city should be certificated, the Board takes into account all the traffic which may be expected to move through that city instead of restricting its consideration only to locally generated traffic. This so-called "beyond" traffic, available to any carrier which will be certificated to the point in issue, represents an important element in determining whether the public convenience and necessity require the certification. It also is important

^{12/} Tampa is wide of the mark in suggesting that this would require a change of plane at San Francisco under this Court's holding in Delta Air Lines v. Civil Aeronautics Board, 107 U.S.App. D.C. 174, 275 F.2d 632 (1959). The change-of-plane restriction involved there was necessitated by the Ashbacker principle, a factor not even remotely presented here.

in selecting the carrier to be certificated, since a carrier with extensive "beyond" routes can provide single-carrier or single-plane service to the newly certificated points via the route junction. In sum, the possible combinations of the authority at issue with the applicant's existing authorizations are always subjects for evidence and consideration in new route proceedings.

In view of the Board's usual practice and its express statement that any authority awarded in the proceeding could be combined with existing authority, it is obvious that Tampa could obtain improved single-carrier service and even single-plane service to the Pacific in the event that the carriers serving Tampa were to be awarded a trans-^{13/}pacific route. Similarly, it is equally obvious that the various carriers serving Tampa and Miami may be expected to support their cases for transpacific authority with evidence on backup traffic at points on their existing systems, including Tampa and the benefits to such^{14/} points which their certification would provide.

^{13/} Tampa presently is served by Northwest, a carrier which also serves many Pacific points, and hence already may obtain single-carrier service to those Pacific points via Chicago and Seattle. Tampa is also located on the routes of Delta, Eastern, National, Northeast, TWA, and United, all of whom, together with Northwest, are applicants in the Board's proceeding. Of particular significance, Tampa is located on National's unrestricted southern transcontinental route between Miami and California.

^{14/} Tampa has now withdrawn its assertion (Br., p. 11, n. 11) that "the Board's expert Bureau of Operating Rights" did not so understand the scope of the proceeding "because its extensive analysis of traffic flows, circulated prior to preparation of exhibits, does not include any data on Tampa." By letter to the Clerk, dated November 14, 1966, counsel for Tampa advised that this is incorrect and that the analysis referred to "does include data on Tampa."

In its petition for reconsideration of the Board's consolidation order (J.A. 81-83) Tampa expressed no doubt as to the scope of the issues in the proceeding insofar as possible service to Tampa was concerned.^{15/} Moreover, in its petition for discretionary review of the examiner's denial of intervention Tampa expressly recognized that "under the issues it could receive single-plane, one-stop service to any or all of the Pacific points being considered" in the case. Indeed, the very purpose of its petition for intervention was to present its case relating to the "traffic support" it could provide, and to urge certification of a carrier best suited to satisfy Tampa's need for transpacific service (J.A. 132).

Contrary to Tampa's contention (Br., p. 11) Rule 302.930 of the Board's Procedural Regulations (14 C.F.R. 302.930) does not preclude this. It requires only that carriers confine themselves to evidence which would "support" service to the points, routes, or areas specifically designated in their applications. As indicated, this is the very purpose of evidence of "backup" or "beyond area" benefits, and presumably the Board's "expert" Bureau of Operating Rights so understood it when it included data with respect to Tampa traffic.

15/ In fact, none of Tampa's present contentions with respect to the consolidation order and the scope of the proceeding were presented to the Board (J.A. 81-83). Instead, Tampa merely asserted that it was a fast growing metropolitan area (J.A. 81); that traffic growth at its airport was high (J.A. 81-2); that the Tampa area is a tourist and convention center and also an "important industrial and commercial center" (J.A. 82); and that it was commencing construction on a new "air terminal complex" (J.A. 82-3). It concluded that these considerations should lead the Board to reconsider its consolidation order. There was no complaint that the order was vague (Tpa. Br., pp. 9-13). There was no attack upon the Board's conclusions as being "unexplained or unsupported" (Br., p. 22); no suggested "alternatives" (Br., p. 20); no quarrel with the "criteria" employed by the Board in limiting the scope of the inquiry (Br., pp. 20-22). Thus, under Section 1006(e) of the Act (infra, p. 50), Tampa's contentions are not open for consideration by the Court. See, e.g., Seaboard & Western Airlines v. Civil Aeronautics Board, 87 U.S. App. D.C. 78, 183 F.2d 975 (1950); Island Airlines v. Civil Aeronautics Board, 363 F.2d 120, 124 (C.A. 9, 1966).

The foregoing is borne out by the Board's order affirming the examiner's intervention order. The Board there held that, "since each of the petitioning communities is now named as a point on the existing routes of one or more of the air carrier applicants, a grant of the application of a particular carrier in this case could make possible new single-carrier or single-plane service between the petitioning communities and points in the Pacific over a combination of the carrier's existing domestic route authority and new transpacific authority that might be granted in the present proceeding . . ." (J.A. 143). Moreover, in recognition of the customary rule heretofore described with respect to "beyond" benefits, the Board stated that "it is reasonable to assume that individual air carrier applicants, and probably community parties, will support their cases with evidence on 'backup traffic' from points on existing domestic routes that could and would move via the gateway points over the new transpacific routes" and that under Rule 14 (supra, p. 9) cities denied intervention would "have a full opportunity . . . to urge the certification of carriers and gateway cities that would make possible single-carrier and single-plane service for them" (J.A. 144).

In sum, the Board's consolidation order and the order with respect to intervention are perfectly consistent, both in terms and in the light of the normal practice in route proceedings, and there is no basis for Tampa's professed inability to understand the scope of this proceeding.

II. Definition of the scope of inquiry in a new route proceeding is peculiarly a matter for agency discretion and there is no showing of abuse of discretion or other error in the Board's consolidation order

It is, of course, self-evident that the Board simply cannot dispose of all matters at one time, or investigate the needs of all cities simultaneously. In recognition of this, Section 1001 (infra, p. 49) provides that the Board may conduct its proceedings "in such manner as will be conducive to the proper dispatch of business and to the ends of justice". Moreover, the courts have consistently recognized the practical problems confronting the Board in disposing of new route cases. As this Court has put it, even in the case of ^{16/} Ashbacker rights, the Board cannot be required to convert every new route investigation "into a massive consideration of the whole of American air transportation". Eastern Air Lines v. Civil Aeronautics Board, 100 U.S. App. D.C. 184, 243 F.2d 607 (1956). Thus, "the Board has a basic right to limit the scope of its inquiries". Frontier Airlines v. Civil Aeronautics Board, 349 F.2d 587, 591 (C.A.10, 1965). In accordance with this rule and the practicalities upon which it rests, at the threshold of every major new route proceeding the Board issues an order limiting the area or points to be considered for possible new service.^{17/} At the same time, there are consolidated into the

^{16/} Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327 (1945).

^{17/} Frequently the Board will define the scope of the proceeding in terms of a geographical area with fixed boundaries, a practice approved by the Supreme Court in Civil Aeronautics Board v. State Airlines, 338 U.S. 572 (1950). See, also, Eastern Air Lines v. Civil Aeronautics
(footnote continued)

proceeding all air carrier certificate applications to the extent that they propose service of the type and within the scope of the investigation as defined by the Board.^{18/}

Not only is the imposition of limits on the scope of a route investigation the Board's "basic right" (indeed duty, if the Board is to discharge its statutory responsibilities), but the courts have repeatedly and uniformly recognized that in such matters agency discretion is exceptionally broad. The governing principles have been succinctly and accurately stated as follows (Western Air Lines v. Civil Aeronautics Board, 184 F.2d 545, 549 (C.A. 9, 1950):

"It would be strange indeed if we were enabled to oversee the administrative docket. The Board is an informed body and must necessarily have the widest latitude in the matter of how it goes about determining the public interest before it. 'Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked--the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to

Board, 271 F.2d 752, 760 (C.A. 2, 1959), cert. denied, 362 U.S. 970. On other occasions, it may consider applications between a specified point or points and a distant area, a procedure approved by this Court in Delta Air Lines v. Civil Aeronautics Board, 107 U.S. App. D.C. 174, 275 F.2d 632, 641 (1959), cert. denied, 364 U.S. 969. Of course, a case may also be limited to consideration of a given type of service between two points. See, e.g., New York-San Francisco Nonstop Case, 29 C.A.B. 811 (1959), 35 C.A.B. 423 (1962), before this Court in United Air Lines v. Civil Aeronautics Board, 108 U.S. App. D.C. 220, 281 F.2d 53 (1960) and Trans World Airlines v. Civil Aeronautics Board, 114 U.S. App. D.C. 17, 309 F.2d 238 (1960).

^{18/} See Frontier Airlines v. Civil Aeronautics Board, *supra*, 349 F.2d 587, in which the court affirmed an order denying consolidation of an application which proposed service within the geographical confines of the proceeding but which proposed a type of service that the Board had determined not to consider.

intervene in one another's proceedings, and similar questions--were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest.' Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940). See, also, Federal Communications Commission v. WJR, The Goodwill Station, Inc., supra, 272."

See, also, United Air Lines v. Civil Aeronautics Board, 97 U.S. App. D.C. 42, 228 F.2d 13 (1955) (a matter "singularly within the Board's prerogative"); Eastern Air Lines v. Civil Aeronautics Board, supra, 243 F.2d at p.609 ("The problem is typically one for agency judgment"); Frontier Airlines v. Civil Aeronautics Board, supra, 349 F.2d at p. 591 (" . . . a matter of discretion peculiarly within the expertise of a specialized administrative body.") Moreover, because of the nature of the determination, the courts have made it clear that "even if they have the power to do so" (Eastern, supra, 243 F.2d at p.609), they should interfere only "in cases of clear abuse of discretion as the result of arbitrary and capricious action" (Western, supra, 184 F.2d at p. 551).^{19/}

With these principles in mind, we turn to the Board's consolidation order in this case. Had the Board permitted the scope of the proceeding to be determined merely by taking the carriers' applications as it found them, it is obvious that a proceeding of gigantic proportions would have resulted. As shown by the Board's orders (J.A. 35-40), many of the carriers named numerous points on their existing

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With these principles in mind, we turn to the Board's consolidation order in this case. Had the Board permitted the scope of the proceeding to be determined merely by taking the carriers' applications as it found them, it is obvious that a proceeding of gigantic proportions would have resulted. As shown by the Board's orders (J.A. 35-40), many of the carriers named numerous points on their existing

^{19/} See, also, Frontier, supra, where the court held that "it is seldom indeed that a court should interfere."

systems in their applications for transpacific authority. Consolidation of these applications would have placed in issue transpacific service to 47 mainland points (including San Antonio, Tampa and Milwaukee) in addition to the 25 points ultimately designated by the Board. In other words, the Board would have been required to determine whether the public convenience and necessity require service between each of 72 mainland points, on the one hand, and "points in the Pacific as far west as India and Pakistan" (J.A.2). It requires no demonstration that a proceeding of such proportions would be exceedingly complex, and this in circumstances in which consideration of transpacific service to many of the mainland points would have been a waste of time in view of their relatively light traffic potential.^{20/}

Tampa argues that the complexity of the case is a "red herring" if, as we have shown, the Board may in any event consider traffic support of, and benefits to, points which were not designated as potential coterminals but which lie on the applicants' existing routes. Tampa is seriously mistaken. Where service to a city is placed in issue, the Board must determine whether the public convenience and necessity require service at such city. If it answers the question in the affirmative, the carrier certificated is under an affirmative statutory obligation to provide service (Section 404(a), 49 U.S.C. 1374). In contrast, the Board does not determine whether service to "beyond" points

^{20/} For example, unrestricted consolidation of the applications of American, Continental, and United would have placed in issue service to points ranking from 26th to 260th in total passengers (based on 1964 figures).

is required and the benefits to such points which the carrier may provide by combining or tacking the new authority with its existing authority is wholly permissive. Thus, the scope of the inquiry with respect to the points specifically in issue is necessarily far more searching and complicated. In such a case the Board must consider and decide, for example, such questions as whether service to the point in question is needed, whether it is economically feasible and, if not, whether service is nevertheless needed at the cost either of federal subsidy or self-subsidization by the carrier. In short, the numerous and varied economic elements which, in their totality, are embodied in the public convenience and necessity concept must be considered and balanced to determine whether the point so needs air service that a carrier shall be placed under a duty to provide it. This is quite a different thing from merely considering the plus factor of incidental benefits to another point which may, but need not, flow from certification of the point or points in issue. Moreover, it is obvious that the larger the number of points in issue, the more complex the case will be and the greater the time necessary for its decision.

In the light of the foregoing, the Board was faced with the difficult problem of steering a middle course, i.e., avoiding an unduly complex and protracted proceeding and at the same time, having in mind traffic and technological developments since the close of the record in the original case, establishing a proceeding sufficiently broad to consider those cities which reasonably might be expected to support certification. The Board reconciled these competing considerations by designating as potential mainland terminals, one or more cities in each

of several broad areas of the country. The cities selected were for the most part "in the top 25 cities from the standpoint of population, with metropolitan area populations of one million or more, and rank in the top 25 mainland U.S. cities in terms of domestic passengers produced" (J.A. 16). The cities selected were the primary traffic and population centers in their respective areas. Thus, as the Board reasoned, designation of these points should "provide ample coverage" to each general area. Moreover, their size, as well as their status as major traffic generating points, indicated that they had sufficiently realistic potential to warrant exploration of possible service between them and the Pacific. At the same time, since each applicant presently serves a number of the points designated as potential coterminals, the Board avoided giving any one carrier an undue advantage over any other in the competition for transpacific routes, in that each carrier may urge "beyond" benefits in support of its application. This, we submit, was an eminently reasonable resolution of an exceedingly difficult problem, and there is no basis for any assertion that the Board abused its undoubtedly broad discretion.^{21/}

Petitioners contend variously that the Board prejudged their transportation needs and discriminated against them; that its "findings" are inadequate for one reason or another; and that the "standards"

^{21/} Even if the court were of the view that the Board could properly have reached another solution under which San Antonio and Tampa might have been included as potential mainland terminals, "it is for the Board to determine the discretionary point at which remoteness of inquiry will be detrimental to public service." Frontier Airlines v. C.A.B., supra, 349 F.2d at p. 591.

utilized by the Board were either illegal per se or were arbitrarily applied to them. All of the contentions are without merit.

As we have said before, the Board simply cannot consider possible service to all cities at one time. It is always necessary to draw a line somewhere. This plainly does not mean, however, that, in drawing the line, a determination to consider service at certain cities rather than others represents any decision that similar service at the other cities may not in fact be required by the public convenience and necessity. Rather, it means simply that in determining what route applications or portions thereof merit its attention at a given time, the Board has made a judgment as to which possible needs may be most significant and thus which proposals are most likely to provide the basis for a fruitful inquiry.^{22/} If this be "prejudgment", it is no more than is required as an essential incident of the practical imperative -- and the Board's "basic legal right" -- of placing some limitation on the scope of inquiry. It therefore in no way impinges upon petitioners' rights.

What has been said is also dispositive of San Antonio's claim that the Board's failure to designate it as a potential coterminal constituted "discrimination" against it. It is true, of course, that the Board refused to follow an "indiscriminate approach" (J.A. 15) which would have necessitated consideration of the requirements of the public convenience and necessity with respect to service at 72 mainland cities

^{22/} As previously indicated, the Board normally and necessarily imposes such limitations regardless of the scope of the route proposals which may be contained in pending applications.

of varying degrees of importance. In this sense the Board "discriminated" against every city in the United States which was not named as a potential coterminal, including, no doubt, many cities which "compete" with those that were included. Most cities of any consequence have "competitors" and these, in turn, have their competitors, and so on in an ever widening circle.^{23/} Thus, unless the Board is to consider certification at virtually all major cities at one time -- the courts have held that it need not -- "discrimination" of the sort here involved is inevitable.

Petitioners' reliance on Greensboro-High Point Airport Authority v. Civil Aeronautics Board, 97 U.S. App. D.C. 358, 231 F.2d 517 (1956) and City of Houston v. Civil Aeronautics Board, 115 U.S. App. D.C. 94, 317 F.2d 158 (1963) is misplaced. In the former, Greensboro and Charlotte (which lies south of Greensboro) were intermediate points on an existing route of Eastern Air Lines between Detroit and Miami. The Board added a new segment between Charlotte and Detroit via new intermediate points and accomplished this by "splitting off" the route at Charlotte rather than at Greensboro. This made possible additional

^{23/} Indeed, San Antonio claims that it competes with all 25 of the cities which were designated as potential coterminals, including therefore, such distant points as Boston, Minneapolis and Seattle.

flights at Charlotte which might bypass Greensboro. In short, Greensboro's claim of discrimination related to Board action affecting a route on which both Greensboro and the allegedly preferred city were located. The City of Houston case is likewise inapposite. It involved denial of intervention by Houston in a proceeding "which might affect or vitiate a prior Board decision in which Houston had a 'substantial interest'". In contrast to the situations involved in those cases, the Board's action here will not disturb any existing relationships.

Petitioners also make the familiar contentions that the Board relied upon inadequate "standards" and "findings". The short of the matter, however, is that the findings made by the Board in this case are of the sort customarily made in consolidation orders and no more is required by the numerous judicial decisions affirming such orders.

Petitioners' contentions with respect to the Board's "findings" rest in large part upon the assumption that consolidation orders must contain detailed findings and conclusions of the sort required for adjudicatory decisions on their merits.^{24/}

^{24/} Tampa (Br., p. 9) specifically relies upon section 8(b) of the Administrative Procedure Act (5 U.S.C. 1007) and (Br., p. 13) upon such cases as Northeast Airlines v. Civil Aeronautics Board, 351 F.2d 579 (C.A. 1, 1964) and Braniff Airways v. Civil Aeronautics Board, 113 U.S. App. D.C. 132, 306 F.2d 739 (1962) which involved final Board decisions on the merits of route proceedings. While not citing the Administrative Procedure Act, San Antonio relies (Br., p. 17) on the same line of cases as does Tampa.

The assumption is erroneous. There is nothing in the cases cited by petitioners or in section 8(b) of the Administrative Procedure Act imposing a requirement for detailed findings and conclusions in consolidation and other procedural orders. As indicated, the cases relied on by petitioners involved final decision on the merits.^{25/} Moreover, section 8(b) applies in terms only to "decisions", i.e., "recommended, initial, or tentative decision[s], or decision upon agency review of the decision of subordinate officers. . . ." In short, "the provisions of section 8 . . . govern the procedure subsequent to hearing", and the requirements with respect to findings, conclusions, and reasons apply to substantive decisions on the merits.^{26/}

To the extent that the Administrative Procedure Act may be deemed relevant to the present case, section 6(d) provides as follows:

"(d) DENIALS.--Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds."

^{25/} Tampa does cite two cases which, it says, stand for the proposition that the findings requirements of section 8(b) are applicable to orders of the sort here involved. In fact, both are wholly irrelevant. Textile Workers v. NLRB, 111 U.S.App. D.C. 109, 294 F.2d 738 (1961) involved a final order of the Board on the merits in an unfair labor practice proceeding. Lam Man Chi v. Blanchard, 314 F.2d 664 (C.A. 3, 1963), also cited by Tampa, is even less in point. It involved denial of a preliminary injunction without the findings required by Rule 52 of the Federal Rules of Civil Procedure.

^{26/} Attorney General's Manual on the Administrative Procedure Act (1947), p. 81.

Contrasting this provision with section 8(b), which provides that "decisions (including initial, recommended, or tentative decisions) shall . . . include a statement of . . . findings and conclusions, as well as the reasons or bases therefor, upon all the material issues of fact, law, or discretion presented on the record. . .", it is clear that a distinction has been drawn between the kind of explanation to be made by an agency in denying a "request" in an agency proceeding and in issuing a decision. In the former case a "simple statement of procedural or other grounds" is adequate, while in the latter a more elaborate reasoned opinion is required.^{27/}

The Board's orders defining the scope of the Transpacific Investigation and refusing to expand it are "self-explanatory" and, indeed, go far beyond any requirement that they contain a "simple statement of procedural or other grounds". The Board made it clear that its purpose was to avoid unduly complex and protracted proceedings, particularly in view of the "high priority" assigned to speedy completion of the proceeding by the President (J.A. 15), while at the

^{27/} In Eastern Air Lines v. Civil Aeronautics Board, 85 U.S.App. D.C. 412, 178 F.2d 726 (1949), it was contended that an order denying consolidation of an application for new route authority was unsupported by adequate findings. The Board's order was based upon a finding that "consolidation of Eastern's application . . . would unduly expand the issues and broaden the scope of the . . . proceeding". In this Court the Board argued that this was "self-explanatory" and constituted a "simple statement of the procedural or other grounds" for denying the request for consolidation (No. 10,099, Brief for Respondent, pp. 40-41). This Court agreed:

"The Board's finding that consolidation of this application for trunk-line service into another territory, with applications for local or feeder-line service within New England, would unduly expand the issues and broaden the scope of the proceeding is plainly within the Board's discretion. We think it sufficient." (178 F.2d at p. 727, emphasis added).

same time establishing a sufficiently broad proceeding to give consideration to reasonably realistic service possibilities. Moreover, the Board stated in detail precisely how it had established the scope of the proceeding. No more was required.

But, petitioners insist, considerations of the size and complexity of the proceeding are irrelevant. The cases cited by them, however, deal with orders denying intervention, not orders defining the scope of the issues to be considered.^{28/} All of the cases heretofore cited with respect to the broad discretionary authority of the Board to set limits upon the scope of inquiry in a route investigation are based in large part upon the obvious fact that limitation is necessary if "a hopeless administrative jumble" is to be avoided. See, e.g., Eastern Air Lines v. Civil Aeronautics Board, supra, 178 F.2d at p. 727. Indeed, in Eastern Air Lines v. Civil Aeronautics Board, supra, 271 F.2d at p. 760, the court specifically rejected a city's contention that the Board abused its discretion by excluding the needs of that city from consideration in an area proceeding, holding that "the geographic limits established by the Board were [not] arbitrary or unreasonable, since we must always have in mind the need to keep the hearing within manageable proportions."^{29/}

^{28/} As hereinafter developed, even the most "liberal" cases dealing with intervention recognize that the agencies must be accorded broad discretion in establishing and applying rules for public participation in a proceeding lest their capacity be overtaxed. See, infra, p. 40 .

^{29/} It is also suggested that the "spectre of 'unmanageable proportions' and 'delay' does not exist", arguing that, at most, reversal of the Board's order here would increase the number of mainland points
(footnote continued)

Petitioners also demand an explanation for the "magic" (San Antonio Br., p. 13) of the "standards" of one million population and top 25 traffic ranking cities. They also urge arbitrariness in the Board's selection of several cities which do not have populations of one million or do not rank in the top 25 traffic generating points. Obviously, it is more likely that the public convenience and necessity will require transpacific service at larger population centers with high air traffic generating records. There was, however, no "magic" in the numbers one million and 25, in terms of population and traffic ranking, respectively. ^{30/} The Board could just as readily have confined the issues to service at mainland points having a population of two

being considered as potential coterminals from 25 to 28. Expansion of the proceedings at the instance of these petitioners, would bring into play Rule 302.915(c) of the Board's Procedural Regulations (14 C.F.R. 302.915(c)) which provides that "where any further order of the Board adds to the geographic scope of the proceeding or the scope of the issues therein beyond that defined in the Board's order instituting such proceeding" still other motions for consolidation of applications may be filed addressed to "such additional scope or issues." Thus, if required to expand the proceeding to include petitioners, the Board would be required to do so at the instance of other cities who could advance claims just as meritorious as those urged by petitioners, and each such claim acceded to by the Board would engender still additional requests for further expansion of the proceeding.

^{30/} Both San Antonio and Tampa suggest that the Board erred in considering domestic passenger rankings and that, in San Antonio's words, "it would seem attention should have been devoted to the international passengers generated by the cities" (Br., p. 14). The reason for placing no particular reliance on international traffic figures should be obvious. As the figures set forth in Appendix B to San Antonio's brief disclose, international passenger rankings are heavily influenced by whether the cities are presently gateways for international operations. In other words, as a general (though not universal) rule, cities which by virtue of their geographical location are international gateways, tend to stand higher in international passenger rankings regardless of their inherent traffic generating potential.

million -- as suggested by Delta (J.A. 15) -- standing in the top 10 cities in terms of traffic generation. As its order reveals, however, its purpose was to include as many points as it reasonably could. Thus, the Board's order simply reflects its judgment that the possible needs of certain cities which, for the most part, had populations of one million or more and stood in the top 25 cities in terms of traffic generation, were the most realistic and hence provided the most reasonable subject for investigation. As in the case of any judgment of this nature, we submit that no further elaboration is possible as a practical matter, or necessary as a matter of law.^{31/} The requirements for findings and reasons necessarily vary with the "context of the situation presented". Alabama G.S.R. Co. v. United States, 340 U.S. 216, 228 (1951).

The fact that two of the points included -- Portland and Phoenix -- have less than one million population and that Portland and San Diego do not rank in the top 25 cities in terms of domestic passengers produced does not stamp the Board's action as arbitrary.^{32/} Portland is a traditional gateway for Pacific air transportation. In fact, all present U.S. flag routes to the Pacific include Portland as a terminal. San

^{31/} As was said by Mr. Justice Holmes, dissenting, in Louisville Gas Co. v. Coleman, 277 U.S. 32, 41 (1928), cited with approval in Addison v. Holly Hill Products Co., 322 U.S. 607, 611 (1944):

"Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the [agency] must be accepted unless we can say that it is very wide of any reasonable mark."

^{32/} Portland ranks 27th, San Diego 28th, and Phoenix 24th.

Diego was included primarily because of its potential need for service to Hawaii, a need which the Board originally found to exist in the domestic phase of the prior proceeding. While Phoenix (which ranks 24th in domestic traffic) is "not as large as other cities selected from the standpoint of population, it develops a substantial volume of traffic and is an established air transportation hub in its particular region" (J.A. 16).^{33/}

Tampa argues that it ranks in the top 25 cities in terms of domestic passengers (23rd in 1964) and hence that the Board was arbitrary in failing to include it as a potential coterminal, particularly in view of the fact that the Board included two other points -- Portland and San Diego -- which did not rank in the top 25. The reasons for the Board's inclusion of Portland and San Diego (which ranked 27th and 28th, respectively) have already been explained. Moreover, neither a population of one million nor a ranking in the top 25 cities in terms of domestic passengers was treated by the Board as automatically entitling a city to be designated as a potential mainland coterminal.^{34/} At the

^{33/} Little need be said regarding the attacks which petitioners level at the Board's conclusion that "the 13 new cities selected as potential coterminals, which lie east of the West Coast gateways, produce a reasonable balance of . . . geography" (J.A. 17). They carp at the Board because certain cities designated by it represent a greater percentage of the total population in their areas than do other designated cities in theirs. This is wholly beside the point. The fact is that, as defined by the Board, the proceeding will include issues of service to the most significant traffic generating points in each general area of the country and thus the most significant service needs of the entire mainland will be considered.

^{34/} Appendix C to Tampa's brief shows that Cincinnati and Hartford/Springfield, neither of which was designated as a potential coterminal, both have metropolitan area populations in excess of one million. It also shows that the 20th ranking city in terms of passengers (Las Vegas) was not included.

risk of undue repetition, the Board could not place in issue the needs of every city in the United States.

III. The Board did not abuse its discretion in denying petitioners' requests for intervention

Underlying petitioners' arguments with respect to intervention is the premise that all persons interested in the proceeding have a "right" to participate as full parties regardless of the practical impact which such participation might have upon the efficient conduct of the proceeding. The Act confers no such right. On the contrary, it simply provides that "any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate". (Section 401(c), infra, p. 49). Thus, in contrast to such statutes as the Federal Communications Act, under which the cases principally relied upon by petitioners arose, and which contains detailed provisions for participation in the hearings by "the applicant and all other parties in interest" (47 U.S.C. 309(e)), Congress saw fit to limit the mandatory participation in route proceedings to the filing of memoranda. Beyond this, it left to the Board the matter of determining the extent of participation in such proceedings by "interested persons", and this in the context of a statutory directive that the Board dispose of applications "as speedily as possible."^{35/} There is no showing that the Board exercised this discretion arbitrarily in this case.

^{35/} Section 401(c). See, also, section 1001 (infra, p. 49), which authorizes the Board to conduct its proceedings "in such manner as will be conducive to the proper dispatch of business and to the ends of justice."

Because of the interrelationship of different airline route systems, large areas of the country are involved in any major route case, and the number of interests which may be affected to some extent is often great. Some of these interests will, of course, be more directly and immediately involved than others. It is obvious that the Board cannot permit intervention by every interest without "hopeless clogging of the administrative process". National Broadcasting Co. v. F.C.C., 76 U.S.App. D.C. 238, 132 F.2d 545 (1943), affirmed, 319 U.S. 239. It is thus necessary as a practical matter to devise some reasonable accommodation between the interests of third persons and the demands of orderly and manageable procedure.

The Board has attempted to accommodate all legitimate third party interests through Rules 15 and 14 of its Procedural Regulations. Rule 15 (infra, p. 51) governs intervention. In many respects, it is similar to Rule 24 of the Federal Rules of Civil Procedure and provides that the considerations relevant to determination of applications for intervention shall include, among other things, the "nature and extent of the . . . interest" of the applicant for intervention; the availability of other means whereby its interests may be protected, including the extent to which the applicant's interest will be represented by existing parties; and the extent to which the would-be intervenors would delay the proceeding.

Denial of intervention under Rule 15 does not, however, foreclose a person from making his views known to the Board. Under Rule 14 (infra, p. 51), any person may appear and offer evidence relevant to the issues

in the Board's proceeding. Any such person may also, with permission of the examiner, cross-examine witnesses and he may file with the examiner a statement of position prior to the conclusion of the hearing. Thus, in practical effect, a Rule 14 participant is able to have his views made known in the Board's proceeding and to develop the facts which support those views. On the other hand, the Board avoids being "bogged" down with the mass of briefs and additional argument which would pour in if every interest were permitted to intervene. As ^{36/} previously indicated, petitioners may participate under Rule 14.

It is concededly impossible to draw a precise line between those interests which justify intervention under the Board's rules and those which do not. By its very nature, the question calls for the exercise of sound judgment and, while the courts have taken an increasingly liberal approach to questions of the right of intervention, ^{37/} this Court's most recent decision on the subject recognizes that the agency "should be accorded broad discretion in . . . applying rules for . . . public participation, including . . . how many are reasonably required to give the Commission the assistance it needs in vindicating the public interest". Office of Communication of the United Church of

^{36/} It is also to be noted that during pendency of this litigation petitioners, like the formal intervenors, are being served with the exhibits of all of the parties in advance of the hearings which are scheduled to begin on February 15, 1967.

^{37/} See, e.g., Interstate Broadcasting Co. v. U.S., 109 U.S.App. D.C. 255, 286 F.2d 539 (1960); Philco Corp. v. F.C.C., 103 U.S.App. D.C. 278, 257 F.2d 656 (1958), cert. denied, 358 U.S. 946.

Christ v. F.C.C., 38/ U.S.App. D.C. , 359 F.2d 994 (1966). Thus, the question presented is simply whether the Board abused its discretion in limiting formal city intervention to those cities (and related state and civic groups) which were designated as potential mainland coterminals, and relegating cities in petitioners' position to participation under Rule 14.

The interest of petitioners in the case was succinctly stated by the Board as follows:

" . . . since each of the petitioning communities is now named as a point on the existing domestic routes of one or more of the air carrier applicants, a grant of the application of a particular carrier in this case could make possible new single-carrier or single-plane service between the petitioning communities and points in the Pacific over a combination of the carrier's existing domestic route authority and new trans-pacific authority that might be granted it in the present proceeding, whereas the selection of some other carrier that lacks existing domestic authority to serve the petitioning communities would preclude such a result" (J.A. 143).

Petitioners correctly point out that such an interest will normally serve as a basis for permission to intervene and the Board specifically recognized this, stating that "it is apparent that the communities have an interest in the proceeding and, under other circumstances, would be granted leave by the Board to intervene. See Order E-20427,

38/ There was involved in the cited case an application for renewal of a television license and the Court's decision was predicated upon the importance of the Commission's having the views of representative members of the public. There were no parties to the case before the Commission to present those views. Here, in contrast, the interests of the traveling public are more than adequately represented by the applicants themselves and the potential coterminals. Further, even those cities denied intervention may, under Rule 14, present their views to the Board.

February 3, 1964" (Ibid).^{39/} Because of the peculiar circumstances surrounding the instant proceeding, however, the Board felt "compelled to the conclusion that the petitions [for intervention] must be denied" (J.A. 143). It was plainly justified in reaching this conclusion.

Among the applicants for route authority in the case are all 11 trunklines in the national transportation system. There are literally hundreds of separate domestic points on the routes of these carriers. The interest of such points in the Transpacific Case is no different in kind or degree from the interests asserted by petitioners in this case. As the Board said, "the petitioning communities are not peculiarly situated but have an interest that is shared by virtually all major cities of the United States that are now named as points on the domestic routes of one or more of the air carriers which have applications for transpacific authority consolidated into this proceeding." Thus, if the petitioners' interest required the Board to grant their applications for leave to intervene, the Board would have no alternative but to grant intervention to any other city on the routes of any of the applicants. It is self-evident that this could lead to utter chaos in the proceeding and hence that the Board was justified in deciding that intervention by petitioners and others similarly situated

^{39/} The order referred to by the Board is the one enunciating what Wisconsin refers to as the "Puerto Rico doctrine" (Br., pp. 18-19).

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should be denied.

But, petitioners argue, there was no such deluge of requests for intervention and they are the only ones still pursuing the matter. Accordingly, the argument runs, the grant of their petitions would not unduly complicate the proceeding. This is beside the point. The question is whether the Board was arbitrary in determining that, in the circumstances of this case, an interest of the sort asserted by petitioners entitled anyone asserting such an interest to intervention. As we have shown it was not. Moreover, as the Board pointed out (J.A. 143) if it were to grant intervention to petitioners it would, "as a matter of fairness" have to take similar action with respect to other communities which had sought leave to intervene (J.A. 143). As the examiner's orders disclose (J.A. 45, 126), some 25 others are in this

40/ Both Wisconsin and San Antonio argue that they were permitted to intervene in the original Transpacific Case and hence that the Board was arbitrary in failing to grant them similar participation in the instant proceeding. As the Board said, however, "this is a new proceeding that involves different proposals and different issues, which, in turn, create different problems" (J.A. 144). That case did not involve applications by all 11 domestic trunklines and thus, unlike this case, the number of points having interests of the sort asserted by San Antonio and Wisconsin was not nearly as large. Moreover, the Board continued:

"The present proceeding is substantially larger and more complex than the prior proceeding and, accordingly, the need to avoid any unnecessary expansion of the case is significantly greater. Equally important, due to circumstances beyond the Board's control the review of the transpacific route pattern which the Board undertook in 1959 still has not been completed. It is therefore imperative in the interest of the traveling public and of the U.S. international flag carriers who seek adjustments of their routes to improve their competitive position against foreign flag operators that the Board take all reasonable steps to insure the earliest possible disposition of that review."

category. There are already approximately 65 parties to the proceeding and thus, as the examiner said, "even with such participation [intervention] limited to those having a clear and direct interest in the outcome, the record to be developed will of necessity be large, complex, and time-consuming in preparation. Were other communities whose interests are more remote to be added, the cumulative net results would be a substantial burden upon the proceeding" (J.A. 42).

The element of delay that results at both the trial stage and at the Board level from the addition of formal parties to a proceeding of this magnitude cannot be lightly dismissed. There are then that many more parties to prepare exhibits and have the exhibits of others served on them; to make formal presentations which must be considered and analyzed; to submit briefs to the examiner which must be read and digested; to request postponements, to urge changes in procedural dates, to present and cross-examine witnesses, etc. -- factors that taken as a whole add materially to the overall complexity and time span of the proceeding. The sizeable and increased burden is also felt at the Board level. There are that many more parties to file exceptions and briefs, to be heard at oral argument, and to seek reconsideration of the ultimate Board decision.^{41/}

^{41/} As the court stated in Crosby Steam Gauge and Valve Co. v. Manning, Maxwell and Moore, Inc., 51 F. Supp. 972 (D.C. Mass. 1943):

"Additional parties always take additional time even if they have no witnesses of their own. They are the source of additional questions, objections, briefs, arguments, motions, and the like, which tend to make a proceeding a Donneybrook Fair. Where he presents no new questions, a third party can contribute usually more effectively and always more expeditiously by a brief amicus curiae and not by intervention."

In striking the balance against intervention by petitioners and similarly situated applicants for intervention, the Board did not rely solely upon the element of delay that would be injected by their formal participation. It also took into account the relative remoteness of their interests in contrast with cities designated as potential coterminals and upon the fact that their participation as formal parties could not be expected to assist significantly in the development of a sound record. Since none of the petitioners is a potential coterminal, none could receive nonstop transpacific service as a result of the proceeding. Moreover, with the participation in the case of every domestic trunkline, all principal U.S. flag carriers and all cargo carriers, and multiple civic and state parties for the potential mainland coterminals, it is inconceivable that the relevant needs of the particular geographical areas in which the petitioners are located will not be fully and exhaustively considered. To the extent that they might desire to add specific evidence concerning their own situations the procedures of Rule 14 are available to them.^{42/}

In the final analysis petitioners rest their case with respect to intervention squarely upon this Court's decision in City of Houston v.

^{42/} Petitioners suggest that their participation as intervenors would add no greater burden to the proceeding than their participation pursuant to Rule 14. Rule 14 at one time permitted participation before the Board at the stages following the examiner's decision and the result was extremely burdensome. See 26 F.R. 4282 where the Board narrowed the extent of participation under Rule 14 and explained its action in part in terms of reducing the burden upon it.

Civil Aeronautics Board, 115 U.S.App. D.C. 94, 317 F.2d 158 (1963).

It is, however, readily distinguishable. The Court's holding in that case was as follows:

"Houston's interest is that of a municipality, closely linked to another municipality with competing interests [footnote omitted], which has been granted the right of intervention without restriction in a proceeding which might affect or vitiate a prior Board decision in which Houston had a 'substantial interest'. In such a situation Houston has a 'substantial interest' in presenting its side of the case in the proceeding. Essential fairness dictates this" (emphasis added).

Here, in contrast, there is no possibility that the Board's action in denying intervention will vitiate or have any adverse effects upon petitioners. To be sure, the Board did not include petitioners as coterminals but we have shown that this was an allowable exercise of its broad discretion. This being so, the interests of cities granted intervention, i.e., the potential mainland terminals, and those denied intervention are not, as in the City of Houston case, "competing". On the contrary, their interests coincide. Since, for example, Houston may be designated as a coterminal, San Antonio will benefit more by urging that Houston should be so designated and that a carrier serving San Antonio should be certificated. In this respect, San Antonio's position is the same as that of Houston and National Airlines, for example, which serves Houston, San Antonio and the Pacific Gateways. Further, Houston and National will undoubtedly present evidence relating to San Antonio's importance as a population center and traffic generator in support of their own cases. In these circumstances, San Antonio's intervention is obviously not required to produce the best

possible result for it. The same sort of analysis applies equally to Milwaukee, in relation to Chicago, and Tampa, in relation to Miami.

CONCLUSION

The Board's orders should be affirmed.

Respectfully submitted,

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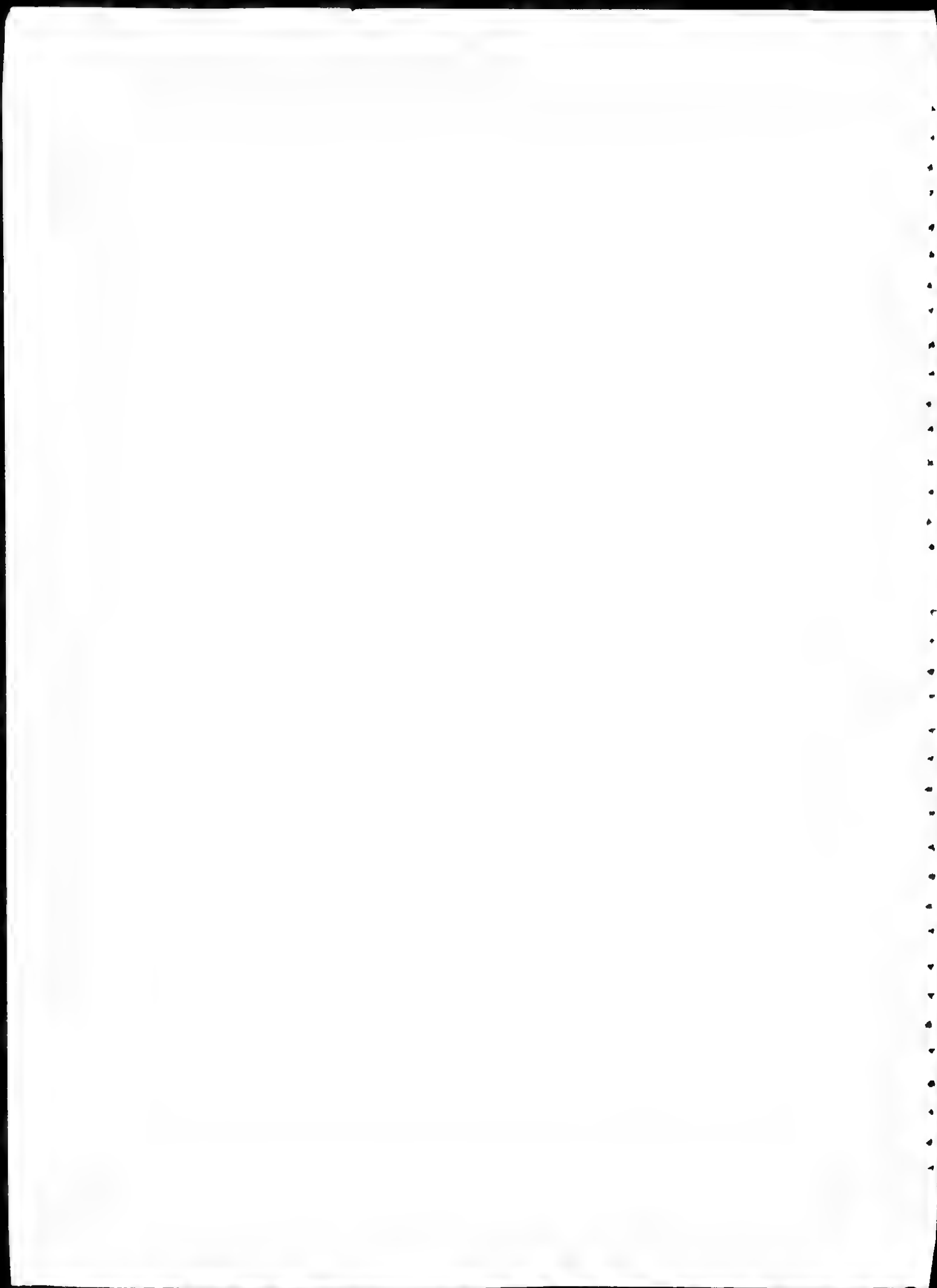
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APPENDIX

Relevant provisions of the Federal Aviation Act (72 Stat. 731, as amended, 49 U.S.C. 1301 et seq.):

TITLE IV - AIR CARRIER ECONOMIC REGULATION

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Certificate Required

Sec. 401 [72 Stat. 754, as amended by 76 Stat. 143, 49 U.S.C. 1371] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

* * * * *

Notice of Application

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for a public hearing, and the Board shall dispose of such application as speedily as possible.

Issuance of Certificate

(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

* * * * *

TITLE X - PROCEDURE

CONDUCT OF PROCEEDINGS

Sec. 1001. [72 Stat. 788, 49 U.S.C. 1481] The Board and the Administrator, subject to the provisions of this Act and the Administrative Procedure Act, may conduct their proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice.
* * * *

* * * * *

JUDICIAL REVIEW OF ORDERS

Orders of Board and Administrator subject to Review

Sec. 1006. [72 Stat. 795, as amended by 74 Stat. 255, 75 Stat. 497, 49 U.S.C. 1486]

* * * * *

Findings of Fact Conclusive

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

* * * * *

Relevant provisions of the Administrative Procedure Act (60 Stat. 237, as amended, 5 U.S.C. 1001 et seq.):

ANCILLARY MATTERS

Sec. 6. [60 Stat. 240; 5 U.S.C. 1005] Except as otherwise provided in this Act--

* * * * *

(d) DENIALS.--Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds.

* * * * *

DECISIONS

Sec. 8. [60 Stat. 242; 5 U.S.C. 1007] In cases in which a hearing is required to be conducted in conformity with section 7--

* * * * *

(b) **SUBMITTALS AND DECISIONS.**--Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

* * * * *

Relevant provisions of the Board's Procedural Regulations

(14 C.F.R. 302):

Section 302.14 PARTICIPATION IN HEARING CASES BY
PERSONS NOT PARTIES

* * * * *

(b) Participation in hearings. Any person, including any State, subdivision thereof, State aviation commission, or other public body, may appear at any hearing, other than in an enforcement proceeding, and present any evidence which is relevant to the issues. With the consent of the Examiner or the Board, if the hearing is held by the Board, such person may also cross-examine witnesses directly. Such persons may also present to the examiner a written statement on the issues involved in the proceeding. Such written statements, or protests or memoranda in opposition or support where permitted by statute, shall be filed and served on all parties prior to the close of the hearing.

Section 302.15 FORMAL INTERVENTION

(a) Who may intervene. (1) Any person who has a statutory right to be made a party to a proceeding shall be permitted to intervene therein.

(2) Any person whose intervention will be conducive to the ends of justice and will not unduly impede the conduct of the Board's business may be permitted to intervene in any proceeding.

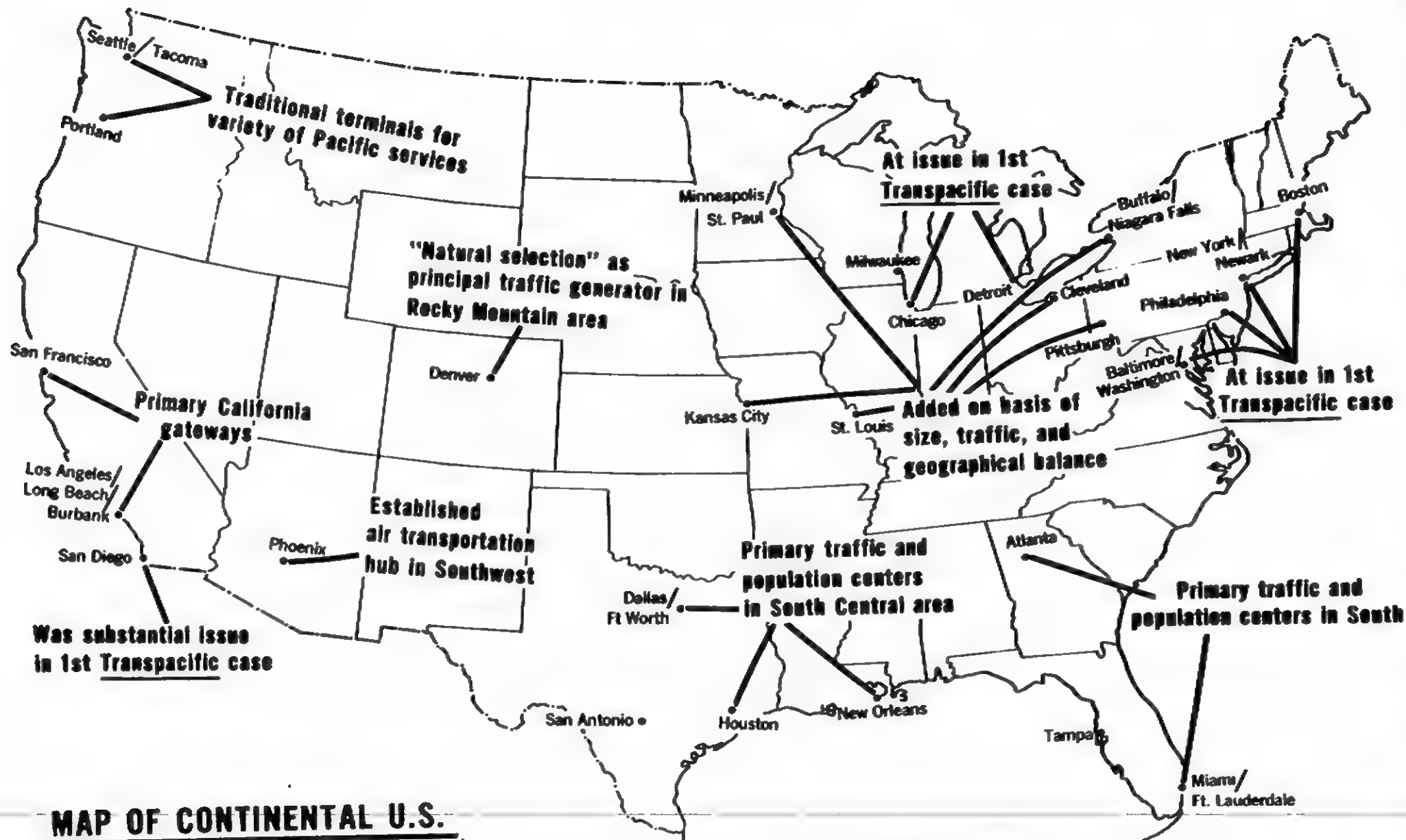
(b) Considerations relevant to determination of petition to intervene. In passing upon a petition to intervene, the following factors, among other things, will be considered: (1) The nature of the petitioner's right under the statute to be made a party to the proceeding; (2) the nature and extent of the property, financial or other interest of the petitioner; (3) the effect of the order which may be entered in the proceeding on petitioner's interest; (4) the availability of other means whereby the petitioner's interest may be protected; (5) the extent to which petitioner's interest will be represented by existing parties; (6) the extent to which petitioner's participation may reasonably be expected to assist in the development of a sound record; and (7) the extent to which participation of the petitioner will broaden the issue or delay the proceeding.

(c) Petition to intervene--(1) Contents. Any person desiring to intervene in a proceeding shall file a petition in conformity with this part setting forth the facts and reasons why he thinks he should be permitted to intervene. The petition should make specific reference to the factors set forth in paragraph (b) of this section.

* * * * *

(d) Effect of granting intervention. A person permitted to intervene in a proceeding thereby becomes a party to the proceeding. However, interventions provided for in this section are for administrative purposes only, and no decision granting leave to intervene shall be deemed to constitute an expression by the Board that the intervening party has such a substantial interest in the order that is to be entered in the proceeding as will entitle it to judicial review of such order.

* * * * *



MAP OF CONTINENTAL U.S.

SHOWING POTENTIAL COTERMINAL POINTS DESIGNATED BY THE BOARD IN ORDER E-23740 (J.A.14) PLUS SAN ANTONIO, TAMPA, AND MILWAUKEE. THE NOTATIONS ARE THE EXPLANATIONS GIVEN BY THE BOARD IN ITS ORDER FOR THE DESIGNATION OF THE POINTS.

FOR BINDING

BRIEF FOR PETITIONERS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,464

GREATER TAMPA CHAMBER OF COMMERCE, *ET AL.*,

Petitioners

388
v.

CIVIL AERONAUTICS BOARD,

Respondent

ON PETITION FOR JUDICIAL REVIEW OF ORDERS
OF THE CIVIL AERONAUTICS BOARD

United States Court of /
for the District of Columbia Circuit

FILED NOV 4 1966

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CLERK

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(i)

QUESTIONS PRESENTED

1. Did the Board err in its establishment of standards for determination of potential mainland coterminal points at which certification of service is to be considered?

2. Did the Board err in applying the aforesaid standards to exclude consideration of Tampa, Florida, as a potential mainland coterminal point?

3. Did the Board err in its establishment of standards for determination of sufficient interest to participate as a party pursuant to 14 C.F.R. 302.15?

4. Did the Board err in denying Tampa's petition to intervene as a party pursuant to 14 C.F.R. 302.15?

(iii)

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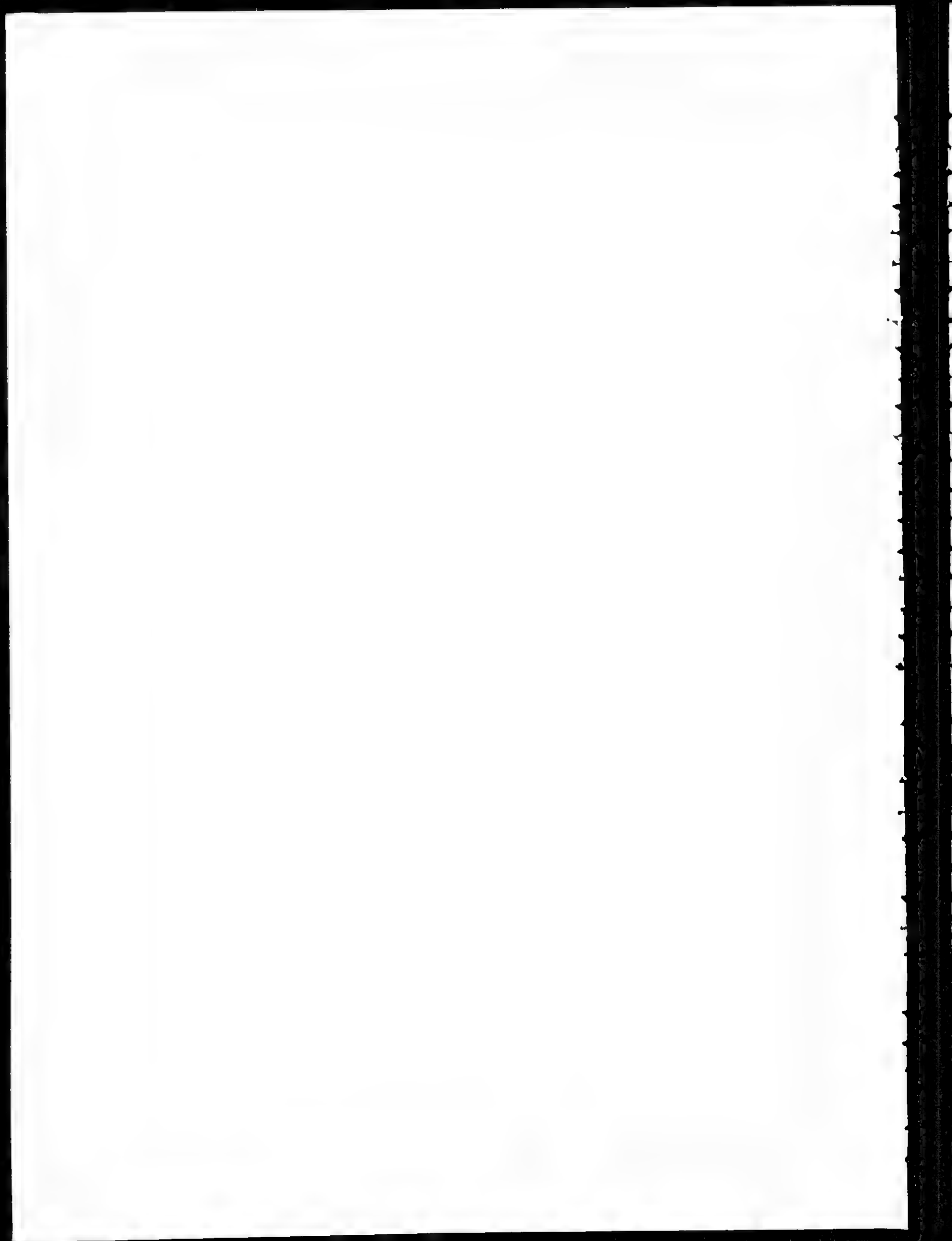
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,464

GREATER TAMPA CHAMBER OF COMMERCE, *ET AL.*,
Petitioners

v.

CIVIL AERONAUTICS BOARD,
Respondent

ON PETITION FOR JUDICIAL REVIEW OF ORDERS
OF THE CIVIL AERONAUTICS BOARD

BRIEF FOR PETITIONERS

JURISDICTIONAL STATEMENT

Petitioners, the Greater Tampa Chamber of Commerce, the City of Tampa, and the County of Hillsborough, Florida, representing present and future air travelers in and around Tampa, Florida, are adversely affected and aggrieved by the Board's orders subject of review which denied the Tampa parties full participation and opportunity to

present their case for transpacific air transportation service. The jurisdiction of this Honorable Court is invoked under Section 1006(a) of the Federal Aviation Act of August 23, 1958, as amended, 72 Stat. 795, 49 U.S.C. § 1486(a), and Section 10 of the Administrative Procedure Act of June 11, 1946, 60 Stat. 243, 5 U.S.C. § 1009.

STATEMENT OF THE CASE

This case involves the Board's refusal to hear Tampa's case for transpacific air service in this, the first major review of transpacific routes in twenty years,¹ on the ground that the case is "unmanageable" and the "delay" in reaching a decision is "serious" unless participation is denied Tampa and other "major cities" whose stake in the case, the Board recognizes, is whether they will or will not be named on transpacific routes of carriers serving them or seeking to serve them.

This proceeding, in which the spectre of decisional delay is invoked to justify excluding Tampa, started in February, 1959, when President Eisenhower requested expedited consideration of the entire Pacific route complex. 32 C.A.B. at 1079-80. The Board imposed no restrictions such as it now imposes, on consideration of applications by carriers holding domestic authority nor on intervention by mainland cities. (Indeed, the new carrier selected for extension to Hawaii, Western, was selected on the basis of the characteristics and needs of its domestic system. 32 C.A.B. at 945-47.) This 1959 proceeding, involving hearings in Hawaii and Washington, a mountain of exhibits and testimony, briefs to the Examiner, an Examiner's recommended decision,

¹ *Pacific Case*, 7 C.A.B. 209 (1946). The renewal cases 1955-60 involved no major expansions of route authority as is involved in the instant proceeding. *Transpacific Certificate Renewal Case*, 20 C.A.B. 47 (1955); *Transpacific Certificate Renewal Case, Reopened*, 26 C.A.B. 481 (1958). See 32 C.A.B. 1187-90 for a summary of the Board's Pacific area authorizations 1939 to 1959.

the intervention of 46 civic parties of whom only 14 filed exceptions and 22 filed briefs or statements of position,² exceptions, briefs to the Board, oral argument to the Board, and submission by the Board of its decision to the President was completed in exactly 21 months.³

On January 18, 1961, the President commended the Board for its excellent study, but disapproved the Board's international decision. The President recommended that the Board consider transpacific routes again "within the next several years." 32 C.A.B. at 976-77.

On January 18, 1961, the Board stayed the domestic (Hawaii) portion of the proceeding, and did *nothing* for the next three years. November 8, 1963, it terminated the domestic phase of the case. Order E-20178.

Western Air Lines, the beneficiary of a Hawaii award in the December 7, 1960 opinion requested this Court to require the Board to issue a certificate to Western.⁴ In a number of orders, this Court urged the Board to act. The Board resisted, maintaining that the public interest lay strongly with delay and inaction.

Finally, the Board succumbed, not by issuing a certificate, but by denying that the public convenience and necessity require any additional authorization at this time. Order E-22995, December 14, 1965, J.A. 5-9.

In June 1965, four and one-half years after terminating or staying the first "expedited" transpacific route review, the Board reopened the domestic phase and instituted a new investigation of international transpacific routes. It expressly chose the most cumbersome and time-

² 32 C.A.B. at 1035-37.

³ The notice of prehearing conference was issued on March 2, 1959, and the Board's decision was dated December 7, 1960.

⁴ *Western Air Lines, Inc. v. C.A.B.*, C.A.D.C. No. 18,305.

consuming method of hearing the two matters—consolidated proceedings. J.A. 1-5.

Approximately one year after instituting the proceeding, the Board, on May 25, 1966, established the scope of the proceeding. J.A. 13. Some time in 1967, the Examiner expects to start hearings. J.A. 98.

The Board claimed, in the Consolidation Order, that the proceeding was "unmanageable" if it heard every new service proposal or considered "the extension of domestic routes, either to Hawaii or beyond." J.A. 15. It decided to restrict consideration of "service" to 25 named U.S. "mainland coterminals." The list purported to include those mainland cities with one million or more metropolitan area populations, which Tampa has, and which rank in the top 25 mainland U.S. cities in terms of domestic passengers produced, which Tampa does. The Board also sought to achieve "geographical balance". Tampa, without explanation, was not included and its petition for an explanation and inclusion was denied, again, without explanation. J.A. 14-17, 137.

The Examiner, under delegated authority, denied Tampa's petition to intervene as a party on the ground that, since Tampa was not designated as a mainland coterminal, its interest is "more remote" and therefore was not entitled to formal participation. Moreover, the "cumulative net result would be a substantial burden upon the proceeding" if non-designated mainland cities were permitted to participate as parties. In any event, Tampa would suffer "no prejudice or injury" because such "general interest in improved service" as Tampa may have "can be adequately represented and developed" by the air carriers serving Tampa and by the designated coterminals in Tampa's area, Atlanta and Miami.⁵ J.A. 41-43, 124.

⁵ Atlanta has not petitioned to intervene and was not made a party by the Board. Miami had no representative at the prehearing conference held June 15-16, 1966. J.A. 91-93. Not until two months after the prehearing conference, August 15, 1966, did the Greater Miami Traffic Association, with a lay representative, petition as a Miami party. Tr. 383.

The Board affirmed the Examiner's exclusion of Tampa as a party but did it on different grounds. Contrary to its expressed determination that extension of domestic routes would not be considered, the Board said that existing route authority could be combined with new transpacific authority. J.A. 143. The only difference, says the Board, between designated and non-designated cities is that designated cities are eligible for nonstop(!)⁶ service to transpacific points while non-designated petitioning cities on the routes of applicant carriers are eligible for single-plane or single-carrier service. The Board, under this view, expressly recognizes that the non-designated cities have a "similar" interest to the designated cities, and, under the Board's own precedents, would be granted leave to intervene. J.A. 143. But the Board finds that the petitioning non-designated cities are "not peculiarly situated", and their interest "is shared by virtually all other major cities of the United States that are now named as points on the domestic routes" of applicant carriers. The "resulting substantial increase in the number of parties, the size and complexity of the record, and the time that would be required to reach a decision" require their exclusion, particularly since the interests of the excluded cities will be "adequately protected" by a combination of air carrier parties and communities with a "similar" interest (*i.e.*, Atlanta, the non-participating city, and Miami, the late and barely-participating city). The Board says that Tampa can contribute its evidence and argument to the record under Rule 14 (14 C.F.R. 302.14). J.A. 144.

From these orders, Tampa appeals.

⁶ No commercial airplane in existence is capable of flying loaded nonstop between the east coast and transpacific points, to say nothing of the absence of traffic to support such services.

STATEMENT OF POINTS

1. The Board has not adequately explained or justified the exclusion of consideration of Tampa from the *Transpacific Route Investigation*.

2. Tampa meets the alleged standards for inclusion, one million metropolitan area population, top 25 in domestic passenger production, and geographical balance, but is inexplicably excluded, while other cities, which do not meet the standards, or rank below Tampa, are inexplicably included. Such action is illegal since it is inadequately explained and is arbitrary, capricious and unreasonable.

3. The Board erred in limiting the potential civic intervenors to the designated mainland coterminals. The opportunity, *vel non*, to obtain single-plane or single-carrier service justifies participation as a full party.

4. Tampa, even if not a designated coterminal point, has a similar stake in the proceeding to that of the designated coterminals and should be permitted to present its own argument to the Board. It is not only insufficient, but abhorrent, that a community be denied an equal opportunity to present its case for service with that of competing cities on the ground that it may rely on the competing designated cities to vindicate its interests before the Board.

SUMMARY OF ARGUMENT

This is a case which, for four years, the Board resisted starting. It is an effort to complete what the Board began in 1959 but which was disapproved by the President in 1961. When the Board did start this proceeding, it expressly chose the most cumbersome method: contemporaneous consideration of domestic and international issues in the same proceeding.

After taking four years to institute the case, the Board took one more year to define the scope of the issues, and its examiner is planning to consume another year before hearings will even start.

Almost unbelievably, the Board has excluded Tampa and is here before this Court because it says that doing so is necessary to expedite the proceeding, and expediting it is a matter of serious national concern. This Court will find this desperate interest in speed difficult to accept after listening to the Board's repeated asseverations between 1963 and 1965 that the public convenience, necessity and interest required that *no* action be taken to grant new authorizations in the Pacific. *Western Air Lines v. C.A.B.*, C.A.D.C. No. 18,305.

The Board is hoist on its own petard. It says it must exclude non-designated cities from consideration of "direct service" and from participation as formal parties because of the burden they will impose on the record and the delay they will create in decision. It also says, however, that it *is* considering direct single-plane service from non-designated cities and that *all* the evidence that non-designated cities would offer as formal parties may be offered by them as informal parties, and *all* the arguments they might make will be made by air carriers serving them and by designated cities in their areas. There is no reason to exclude Tampa since there is no cognizable saving in record length or argument. Moreover, the Board's statement of contradictory views of its own action requires remand for a clear and understandable statement of whether Tampa is or is not in the case.

Tampa should not be denied an opportunity to present its case for transpacific service under any view of the scope of the proceeding. This is the first major review of transpacific routes in twenty years. We stand on the threshold of the supersonic age. Route patterns laid down in this case will endure for a generation. Tampa should be able to present its own case for inclusion in the transpacific routes of tomorrow. It certainly should not have to rely on Atlanta or Miami, with

which it competes, to protect and advance Tampa's interests. Moreover, Atlanta, though designated, has not even intervened; and Miami intervened only recently and has not as yet participated in any way.

Tampa does meet the novel criteria the Board has enunciated for determination of those mainland points which may be considered, and present their cases as formal parties, in the *Transpacific* case: It has one million metropolitan area population, it ranks in the top 25 domestic passenger-producing points, and its inclusion is necessary to give geographical balance to the southeastern part of the United States which has less representation than any other section of the country. The Board's reasons for using these unusual criteria to limit the scope of the case are unexplained. These criteria have neither an obvious relationship to future international air transportation requirements, nor, assuming they have such relationship, have they been consistently applied. Cities which do not meet them have been included; Tampa, which not only does meet them, but ranks above designated cities, is excluded.

The Board has not adequately explained or justified why Tampa should be excluded. Nor has the Board adequately explained or justified why, if the case is unmanageable, it neither restricted consideration nor participation of points in Hawaii, Alaska, or the far Pacific, where communities, smaller and generating less traffic than Tampa, are permitted to present their cases without restriction or limitation, while Tampa, inexplicably and inconsistently, may not.

The Courts of Appeals have heard agencies wail for over twenty years that liberal intervention will clog and delay their processes. The agencies have apparently done quite well, nevertheless. They have never been able to document a claim of unmanageability. The Board has made no documentation of its complaint in this case. The Board has the means to consolidate presentations, restrict evidence to written form, circulated in advance, and require contemporaneous filing

of exceptions, briefs, and argument. The Board has considered more than 100 cities in numerous cases. It does not have to restrict itself to 25 cities to be able to handle this case.

The courts have never accepted the claim of administrative convenience as overriding the precious, basic right to hearing, especially for representatives of the public. *Office of Communications of the United Church v. F.C.C.*, *infra*; *Scenic Hudson Preservation Conference v. F.P.C.*, *infra*.

ARGUMENT

I

The Board's Orders Are Not Supported by Adequate Findings and Rationale

The salutary and essential legal requirements of adequate findings and a clear statement of reasons applies to these orders. Adequate findings and rationale are requirements of Due Process.⁷ The Administrative Procedure Act requires that *all* decisions in adjudicatory proceedings be based on adequate findings and rationale. Section 8(b), 5 U.S.C. 1007(b). The Courts have applied the requirement of adequate findings to orders denying a hearing. *Textile Workers of America, AFL-CIO v. N.L.R.B.*, 114 App.D.C. 295, 294 F.2d 738 (1961); *Lam Man Chi v. Bouchard*, 314 F.2d 664 (C.A.3, 1963).

A. The Board Does Not Clearly State Whether Consideration of Service to Tampa Is in or Out of the Case.

Amazing as it may seem, the Board's orders are not clear on the basic question of whether consideration of service to Tampa is or is

⁷ As this Court pointed out in *Saginaw Broadcasting Co. v. FCC*, 68 App. D.C. 282, 96 F.2d 554, 559 (1938):

"The requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber methods. . . . This is fully as important in respect of commissions as it is in respect of courts."

not a part of the case. The Board, on one hand, says that it wants to exclude service to Tampa in order to avoid complication, complexity, a substantial burden on the record, and delay. (J.A. 13) On the other hand, the Board says that Tampa will have a "full opportunity" to introduce evidence and to urge the certification of carriers which will make possible single-plane service between Tampa and Pacific points. (J.A. 145) The Board obviously cannot have it both ways.⁸ It cannot exclude Tampa in the name of administrative convenience and also claim that Tampa is included.

It would appear that consideration of direct service between Tampa and Pacific points is not in the case, for if it were, none of the claimed objectives of administrative convenience and expedition would be realized. The Consolidation Order, E-23740, states that the Board is "convinced" that it should not attempt "to hear" or "consider"

"the extension of domestic routes, either to Hawaii or beyond." J.A. 15

Paragraph 2 of the Consolidation Order recites:

"The potential mainland coterminal points at which certification of service is to be considered are as follows:" — and the list does not include Tampa. J.A. 30.

The Consolidation Order invited the applicant air carriers to amend their applications "to conform to the scope of the proceeding as it has been set by the Board." J.A. 29. Carriers which had named Tampa, amended their applications to delete Tampa.⁹ Carriers which

⁸ Tampa filed a Motion for a ruling to clarify this question. The Examiner refused to make "anticipatory and declaratory rulings at this juncture." See Appendix B, hereto.

⁹ Northeast (Docket 17041); Delta (Dockets 17133 and 17134).

had applied for Pacific routes originating at the California termini of their systems (*e.g.*, National, Docket 17052, 17053), amended their applications to name the designated inland coterminal points, thus changing their application from an extension of their domestic system to one providing for service only to the listed points. Carriers whose domestic systems did not extend to listed coterminal points, amended their applications to name them.¹⁰ It is clear that the air carriers by so amending their applications interpreted the scope of the proceeding to be limited to service between the designated mainland coterminals and Pacific points.

In view of the fact that the carriers have amended their applications to eliminate specific description of Tampa as a named point, they are prohibited by the Board's Rules from offering any evidence supporting service to Tampa: under the Board's Rules, evidence is limited to service "specifically described" in the carriers' applications.¹² Evidence related to service between transpacific points and Tampa (*e.g.*, traffic forecasts, schedules, need) may not be received. Indeed, were the Board to receive it, the Board would not be avoiding the record burden, complexity and delay it claims is necessary to the public interest.

¹⁰ Continental (Dockets 15386 and 16616; Pan American (Dockets 15440 and 15559); Slick (Docket 14552); TWA (Docket 16947); Western (Docket 17042).

¹¹ The Board's expert Bureau of Operating Rights also apparently so interpreted the scope of the proceeding because its extensive analysis of traffic flows, prepared prior to preparation of exhibits, does not include any data on Tampa.

¹² 14 C.F.R. 302.930:

(a) *Route authority not specifically applied for.* Applicants for certificate authority under Section 401 of the Act may not introduce, in support of awards to them of route authority, evidence which does not support service to the points, routes, or areas specifically described in their applications pursuant to §201.4(c)(3) and (4) of this chapter.

Finally, since the Board has limited the scope of the case to the listed mainland points, the extension of a domestic route to other than the listed points would not be within the issues of the case and would be subject to a change-of-plane restriction. *Delta Air Lines v. C.A.B.*, 107 App.D.C. 174, 257 F.2d 632 (1959), *St. Louis - Southeast Service Case*, 31 C.A.B. 917 (1960).

While it thus appears clear that consideration of service to Tampa is excluded, and must be, else the administrative convenience sought to be achieved by exclusion of direct service between Tampa and Pacific points would not be realized, the Board has said, confusingly, that direct service is *not* excluded, but is within the issues to be considered.

"On the other hand, since each of the petitioning communities is now named as a point on the existing domestic routes of one or more of the air carrier applicants, a grant of the application of a particular carrier in this case could make possible new single-carrier or *single-plane* service between the petitioning communities and points in the Pacific over a combination of the carrier's existing domestic route authority and new transpacific authority that might be granted it in the present proceeding, whereas the selection of some other carrier that lacks existing domestic authority to serve the petitioning communities would preclude such a result." J.A. 143, emphasis supplied.

"Moreover, it is reasonable to assume that individual air carrier applicants, and probably community parties, will support their cases with evidence on 'backup traffic' from points on existing domestic routes that could and would move via the gateway points over the new transpacific routes. The petitioning communities will, of course, have a full opportunity under Rule 14 to urge the certification of carriers and gateway cities that would make possible single-carrier and *single-plane* service for them." J.A. 145, emphasis supplied.

Consideration of evidence of traffic and service by extension of a domestic route to transpacific points is absolutely irreconcilable with the Board's declaration that investigation of transpacific routes "should not be accomplished . . . by considering the extension of domestic routes," and its order that "certification of service is to be considered" only at the listed mainland points. J.A. 15,30. Nor is it reconcilable with the repeated declarations that consideration of such service would be "unmanageable," "unduly complicate and delay the proceeding," "substantially burden" the record, and be "contrary to the public interest." J.A. 15, 42, 143, 145.¹³

The Board is required to state clearly what it is doing and why. *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 196-97 (1941); *Northeast Air Lines v. C.A.B.*, 331 F.2d 579 (C.A.1, 1964); *City of Lawrence v. C.A.B.*, 343 F.2d 583 (C.A.1, 1965); *Braniff Airlines v. C.A.B.*, 113 App. D.C. 132, 306 F.2d 739 (1962). These orders are unclear and contradictory.

The Board's orders should be set aside and the Board should be directed to clarify whether consideration of service to Tampa is in or out of the case.¹⁴ If, as the Board claims, consideration of direct service to Tampa is in the case, then the Board should consolidate ap-

¹³ A similar confusion appears in the analysis of the "interest" of the various cities to determine whether intervention should be permitted. The Examiner said that the interest of non-designated cities is "more remote," and they do not have "a clear and direct interest in the outcome." J.A. 42. While the Board sustains the Examiner's exclusion of non-designated cities, it says that their service to the transpacific is as much at stake as the designated cities (J.A. 143), and that the designated and non-designated cities have a "similar" interest. J.A. 145. If the interest is similar, why exclude them?

¹⁴ As the Court of Appeals for the First Circuit said in *Northeast Airlines v. C.A.B.*, *supra*.

"There should be no room for this dispute. Courts ought not to have to speculate as to the basis for an administrative agency's conclusion." 331 F.2d at 586.

plications specifically describing such service and permit Tampa to participate in the proceeding.

B. The Board's Conclusions Are Unexplained and Unsupported.

1. The Board has not made the necessary statutory ultimate findings.

Nowhere does the Board make the necessary statutory ultimate findings that exclusion of consideration of direct service to Tampa is "conducive to the proper dispatch of business and to the ends of justice." Section 1001, Federal Aviation Act, 49 U.S.C. 1481. These are the standards imposed by Congress and they must be expressly applied by the Board. The Courts rigidly enforce the requirement of statutory ultimate findings.¹⁵

The conclusory findings which the Board does make: "could produce a proceeding of unmanageable proportions," "unduly complicate and delay the proceeding," "be a substantial burden upon the proceeding," and be "contrary to the public interest"¹⁶ are not the statutory criteria or standards for determining the scope of proceedings.

2. The Board can readily manage the proceeding.

The Board states that including Tampa and the other cities seeking to participate "could produce a proceeding of unmanageable proportions." J.A. 15. It is significant that the Board does not find that inclusion of Tampa "would" produce an unmanageable proceeding, it says only that an unmanageable proceeding "could" result. Certainly, the mere speculation or possibility of an unmanageable proceeding

¹⁵ *City of Yonkers v. United States*, 320 U.S. 685 (1944); *United States v. Baltimore & Ohio Ry. Co.*, 293 U.S. 454 (1935); *Mahler v. Eby*, 264 U.S. 32 (1924); *Public Utilities Commission v. Federal Power Commission*, 205 F.2d 116 (C.A. 3, 1953).

¹⁶ J.A. 15, 42, 138, 143.

should not be the basis for exclusion of Tampa.¹⁷ The Board's orders should be set aside to require it to definitely find that inclusion of Tampa "would" result in an unmanageable proceeding.

No such finding can be made. Assuming that consideration of Tampa will add sufficiently to the issues, evidence and argument (which is by no means clear), the Board has the means, under its Rules of Practice (14 C.F.R. 302) and the Examiner's directives (J.A. 106-10), to manage the proceeding. The evidence, including testimony, must all be reduced to writing and circulated to all parties prior to the hearing. J.A. 106-07. Only relevant, material, and non-cumulative evidence may be proffered. 14 C.F.R. 302.24(b). Cross-examination is limited to the scope of the direct examination and to witnesses whose testimony is adverse. J.A. 109. Proposed findings and argument are limited to the record, and are submitted by all parties contemporaneously. 14 C.F.R. 302.26, 302.31(c)(1). At oral argument, the parties are rigidly limited in time allotment (generally 5, or at most, 10 minutes for a civic party).

Not only does the Board have procedures which give it control of every aspect of the proceeding and the ability to manage the proceeding, but also the Board *has* conducted extensive proceedings involving consideration of scores of cities: *e.g.*, *Southern Transcontinental Service Case*, Docket 7984 et al., over 100 cities considered; *Pacific Northwest-Southwest Service Investigation*, Docket 15459 et al., over 100 cities considered.

The Board must find that it *cannot* manage this proceeding, and if

¹⁷ An agency may not "shelter behind uncritical generalities." *Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61, 81 (1953). In *Hall v. F.C.C.*, 103 App. D.C. 248, 257 F.2d 626, 628 (1958), this Court remanded an F.C.C. decision which made the inadequate finding that "network availability *may* determine *in many instances* whether a station will survive. . ." (Court's emphasis)

it so finds, *why* it cannot manage this proceeding. As this Court recently pointed out in *United Church of Christ*:¹⁸

"In light of the Commission's procedure in this case and its stated willingness to hear witnesses having complaints, it is difficult to see how a grant of formal standing would pose undue or insoluble problems for the Commission." 359 F.2d at 1004.

* * *

"Moreover it is no novelty in the administrative process to require consolidation of petitions and briefs to avoid multiplicity of parties and duplication of effort." 359 F.2d at 1006.

* * *

"The fears of regulatory agencies that their processes will be inundated by expansion of standing criteria are rarely borne out." 359 F.2d at 1006.

3. Size, complexity and delay are not sufficient reasons to exclude consideration of Tampa.

The Board complains that the proceeding is "large," "complex," and "time-consuming." J.A. 143. These observations, assuming they are true, do not justify excluding Tampa. *Hall v. F.C.C.*, 103 App.D.C. 248, 257 F.2d 626, 628 (1958).

Many of the Board's cases are "large." Many are "complex." Virtually all are "time-consuming." That the *Transpacific* case is any or all of these, is not, in itself, justification for excluding consideration of service to Tampa (particularly since the Board itself made the case larger, more complex and time consuming by combining consideration of domestic and international Pacific routes). The Board must find

¹⁸ *Office of Communication of United Church of Christ v. F.C.C.*, ____ App. D.C. ____, 359 F.2d 994 (1966).

that it cannot process and decide the *Transpacific* case except by excluding Tampa.

The Board must explain how the case is "unduly complicated" by permitting Tampa to participate and present its case for transpacific service when it apparently expects to receive evidence and effective argument from Tampa and all the other parties it is trying to exclude. J.A. 145.¹⁹

If the issues of Tampa's need for transpacific service, and the carrier or carriers to provide it, are in the case and are to be actively litigated, how is there *any* complication of the case, let alone "undue" complication, by permitting Tampa to present its case itself, in addition to the air carrier applicants and the communities the Board has chosen to be formal parties.

Similarly, it is difficult to understand how there is any delay due to considering Tampa, let alone "serious" delay. The Board has made no findings, nor given any indication of how much the delay would be or what would be the source or cause of delay. *Michigan Consolidated Gas Co. v. F.P.C.*, 108 App.D.C. 409, 283 F.2d 204, 217 (1960).

This proceeding started eight years ago. For some three years, the Board told this Court, numerous times (between 1963 and 1965) that it was *contrary* to the public interest to certificate *any* Pacific routes. *Western Air Lines v. C.A.B.*, C.A.D.C. No. 18,305.

In June 1965, the Board adopted *this Court's* suggestion that it might be suitable now to reexamine the transpacific route structure. J.A. 1. The Board recognized therein that the "full proceedings" combining consideration of domestic (Hawaii) and international Pacific

¹⁹ *Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61, 68 (1953); *Office of Communication of United Church of Christ v. F.C.C.* ___ App. D.C. ___, 359 F.2d 994, 1004 (1966).

routes would be "time-consuming." J.A. 3-4. In its Consolidation Order (which took approximately a *year* to produce), the Board decided that it "should expand substantially the U.S. mainland points to be considered." J.A. 15.

The Examiner has established a procedure which will provide for hearings to commence approximately a *year* after the Consolidation Order,²⁰ which is approximately *two years* after the order instituting the present investigation, eight years after the institution of the *Transpacific* case, and twenty-one years since the last major consideration of transpacific routes.²¹ Whatever delay may be involved in permitting Tampa to present its case (an opportunity which comes once in twenty years), cannot be "serious" in this context.

II

Excluding Tampa Is Arbitrary and Capricious

The prior section of this brief argued that the Board has not adequately explained how or why the proceeding is "unmanageable," and how the proceeding would be unduly complicated and delayed by considering Tampa. This section of the brief assumes *arguendo* that the proceeding would be "unmanageable" and shows that the Board acted arbitrarily and capriciously to reduce the scope of the proceeding by excluding Tampa.

A. Why Did the Board Eliminate Only Mainland United States Cities?

The Board excluded only mainland United States cities. To make the case "manageable," the Board said it would consider only Miami/

²⁰ Hearings are to commence in Hawaii on February 15, 1967, and then move to Washington, D.C. for more hearings commencing March 8, 1967.

²¹ *Pacific Case*, 7 C.A.B. 209 (1946).

Ft. Lauderdale in the entire state of Florida. Florida has a 1965 population of 5,936,000 and has grown 114% since 1950.

The Board could have excluded foreign points, but did not.²² Why should the Tonga Islands, Wake, Tahiti, Guam, Thailand, etc., etc., etc., be given full consideration for direct single-plane and nonstop trans-pacific service, but Tampa be excluded? Tampa's population exceeds almost all of the Island points combined! See Appendix D hereto.

The Board could have excluded points in Hawaii and Alaska but did not. It could have limited consideration of points in the State of Hawaii to only Honolulu. It did not. It said, "... it is desirable to obtain the maximum flexibility to determine the manner in which any needed service should be provided." J.A. 19. It included long-haul service issues to:

	<u>1965 Population</u> (000)
Honolulu	601
Hilo	26
Lihue	4
Kahului	<u>4</u>
Total	635
 TAMPA	 913

The Board could have limited the consideration of points in the State of Alaska, which has, in the entire state, fewer people (253,000) than Tampa has living in its environs (913,000). The Board did not take this alternative. It included consideration of direct service to:

²² The only "limitation" on foreign points is the exclusion of inter-island local air services. J.A. 20-21. Long-haul service to all of these points is expressly included in the case. J.A. 21.

	<u>1965 Population</u>
Anchorage	136,000
Fairbanks	64,000
Cold Bay	85

In terms of population, passenger generation and geographical balance (the criteria the Board claims to have applied), limitation of service to only a few named far Pacific points, or to Honolulu in the Hawaiian Islands, or to Anchorage in Alaska could have reduced the "complexity" of the case.

The Board did not even consider these alternatives. If it did consider them, it gave no evidence of having done so, nor any explanation of why this agency, charged with encouragement and development of an air transportation system adapted to the present and future needs of the commerce of the United States,²³ chose to eliminate only U. S. Mainland points and imposed no restriction whatsoever on foreign points. When it is realized that review of transpacific routes comes once in twenty years, the exclusion of an important United States city like Tampa must be fully explained and thoroughly justified. The reasons for the choice must be clear. The Board's failure to even consider alternatives is plain error.²⁴

B. The Criteria for Discrimination of Mainland Cities Are Arbitrary and Unreasonable.

Never in its entire history of regulating air transportation has the Board ever defined the limits of an investigation in terms of one mil-

²³ Sec. 102, Federal Aviation Act, 49 U.S.C. 1302.

²⁴ *Burlington Truck Lines v. U.S.*, 371 U.S. 156 (1962); *Gilbertville Trucking Co. v. U.S.*, 371 U.S. 115, 130-31 (1962), *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608, 613 (1946); *Michigan Consolidated Gas Co. v. F.P.C.*, 108 App.D.C. 409, 283 F.2d 204, 224 (1960); *City of Pittsburgh v. F.P.C.*, 99 App. D.C. 113, 237 F.2d 741, 751 (1956); *Churchill Tabernacle v. F.C.C.*, 81 App. D.C. 411, 160 F.2d 244, 247-48 (1947).

lion metropolitan area population, top 25 in domestic passenger generation, and geographical balance. When the Board departs from "prior norms" it has a special burden of explanation.²⁵ Departure without explanation from the reasoning and conclusions in other cases has been held arbitrary and capricious.²⁶

The Board neither explained, nor made any effort to explain why it adopted the criteria of one million metropolitan area population, top 25 in domestic air passenger production and geographical balance. These criteria were not those proposed by its expert Bureau of Operating Rights, nor by any other party. The Court cannot perform its review function with nothing more than the Board's conclusion that, "These are the cities which can, in fact, most realistically be related to foreseeable future service requirements." J.A. 16.

Such an "uncritical generality" renders it impossible for the Court "to determine what really lay behind the conclusion which we are to review." *Automatic Canteen v. F.T.C.*, 346 U.S. 61, 81 (1953); *Braniff Airways v. C.A.B.*, 113 App.D.C. 132, 306 F.2d 739, 743 (1962).

The Board has given no explanation of how or why one million population, domestic passenger generation and geographic balance realistically relate to foreseeable *future* service requirements for *international* travel: Why did the Board use one million population, and why did it use it inconsistently—excluding some cities which have more than one million and including some cities which have fewer than one million? What weight did the Board give to population growth, since it is looking to future service requirements?

²⁵ *Secretary of Agriculture v. U.S.*, 347 U.S. 645, 652-54 (1954); *Northeast Airlines v. C.A.B.*, 331 F.2d 579, 588-89 (C.A. 1, 1964) *New York Central Railroad Co. v. U.S.*, 207 F.Supp. 483, 498 (S.D.N.Y., 1962).

²⁶ *City of Lawrence, Mass. v. C.A.B.*, 343 F.2d 583, 588 (C.A.1, 1965); *Boston and Maine R.R. v. United States*, 202 F.Supp. 830 (D.C. Mass., 1962), *aff'd per curiam* 373 U.S. 372.

Why did the Board use domestic passenger generation when it is considering *international* travel? Why did it not use its international air traffic statistics?

Why did the Board apply "geographical balance" to select only Miami/Ft. Lauderdale in the entire State of Florida but include New York, Philadelphia, Baltimore *and* Washington, D. C. in the Middle Atlantic area; Pittsburgh, Buffalo, Niagara Falls, Cleveland, Detroit *and* Chicago in the industrial heartland; Kansas City *and* St. Louis in central United States; Dallas, Fort Worth, Houston *and* New Orleans in South Central U.S.; San Francisco, Oakland, Los Angeles, Burbank, Long Beach, San Diego, Travis Air Force Base *and* Norton Air Force Base in California; Seattle, Tacoma, Portland *and* McChord Air Force Base in the Northwest; Honolulu, Hilo, Lihue *and* Kahului in Hawaii; Anchorage, Fairbanks *and* Cold Bay in Alaska, to say nothing of all the tiny far Pacific points included without restriction?

The reasons for adopting these criteria must be explained. The Board must do more. As laid down by Chief Judge Bazelon in the recent *Melody Music Case*,²⁷ the Board must explain the "relevance" of these criteria to the "purposes" of the Federal Aviation Act. There is no readily observable relationship between our future international air transportation requirements and those mainland cities which today happen to have one million population or more, be in the top 25 in domestic passenger production, and be "geographically" located to achieve "balance." The Board must reveal what its knowledge is "and how it supports the conclusion for which it is invoked." *Michigan Consolidated Gas Co. v. F.P.C.*, 108 App.D.C. 409, 283 F.2d 204, 223-24 (1960).

²⁷ *Melody Music, Inc. v. F.C.C.*, ___ U.S. App. D.C. ___, 345 F.2d 730, 733 (1965).

C. The Board's Application of Its Exclusionary Criteria Is Arbitrary and Capricious.

The Board is not here simply adjusting priorities of hearing—considering one city or group of cities now and the rest later. This kind of case comes once in twenty years. The transpacific route patterns laid down in this case will be operated not only by the present generation of propeller and jet aircraft, but also by the supersonic aircraft expected within the next five years.

The Board has refused Tampa an opportunity to present its case for inclusion on the transpacific routes of tomorrow. It has made this judgment without evidence, hearing or argument.²⁸ It has done so in the name of administrative convenience which must be a subordinate consideration to the determination of the public convenience and necessity. *American Communications Association v. F.C.C.*, 298 F.2d 648, 650 (2d Cir. 1962).

The exclusion is based on the Board's conclusion that Tampa does not meet the criteria of one million population, top 25 domestic passenger generating cities and geographical balance. In fact, Tampa meets all three criteria as they appear to have been applied by the Board.

One million metropolitan area population: The Board does not say what period is being considered. The Examiner has designated 1970 as the year for development of record evidence of public convenience and necessity. J.A. 101-06.

If the Board used 1960 metropolitan area population data, Denver, New Orleans, Portland and Phoenix do not meet the one million metropolitan area criterion, nor do Fort Lauderdale, Tacoma or Fort Worth, all of which can present their cases for transpacific service.

²⁸ The Federal Aviation Act, section 401, evinces Congress' decision that judgments on public convenience and necessity should be made only after hearing and argument. Cf., *U.S. v. Ward Baking Co.*, 376 U.S. 327 (1964).

If 1965 data were used, Portland and Phoenix do not have one million metropolitan area populations, nor do Fort Lauderdale, Tacoma or Fort Worth. Indeed, all of these points had less population in 1965 than Tampa.

Tampa's metropolitan county area population was 913,000 in 1965 and will probably be one million in 1966, the year the Board announced its criteria, based on its historic rate of growth. By 1970, the year of record in this case, Tampa's metropolitan county area population will substantially exceed one million.

The Board's exclusion of Tampa without explanation at the same time that it includes numerous points with less than one million metropolitan area population, and with less population than Tampa, is arbitrary and capricious.²⁹

Domestic passenger generation: The Board does not state what period or data it considered to determine the "top 25 mainland U.S. cities in terms of domestic passengers produced." J.A. 16. Tampa is within the top 25 in 1960 domestic O&D passengers (it ranked 21st). Tampa is within the top 25 in 1964 domestic O&D passengers (Tampa ranked 23d). Tampa also ranks in the top 25 in international O&D passengers for both 1960 and 1964 (ranking 21st in 1960 and 24th in 1964).

On the other hand, there are cities included as mainland coterminals which are not in the top 25. Portland and San Diego ranked 27th and 28th in 1964 domestic O&D. Portland, San Diego and Baltimore ranked 26th, 28th and 31st, respectively, in 1960 domestic O&D passengers.

Tampa, which is in the top 25 domestic passenger-producing cities

²⁹ *Melody Music, Inc. v. F.C.C.*, ___ App. D.C. ___, 345 F.2d 730 (1965); *City of Lawrence, Mass. v. C.A.B.*, 345 F.2d 583, 588 (1st Cir., 1965); *Mary Carter Paint Co. v. F.T.C.*, 333 F.2d 654 (5th Cir., 1964).

and outranked the designated coterminals of New Orleans, Phoenix, Portland and San Diego in 1960 data, and the designated coterminals of Phoenix, Buffalo/Niagara Falls, Portland and San Diego in 1964, is entitled to an explanation of why it is excluded. Even more so, when it is recognized that in international O&D passenger generation Tampa's U.S. mainland rank of 24 in 1964 exceeds the designated mainland coterminals of San Diego (25th), Buffalo/Niagara Falls (26th), Atlanta (28th), Kansas City (29th) and Phoenix (36th).

Geographical balance: The Board says that to achieve "geographical balance", it has made some "minor exceptions" to the two foregoing criteria of one million population and top 25 in domestic passenger productions. Since Tampa meets both criteria there is no basis for excluding Tampa on the ground of geographical balance.

Tampa certainly cannot be excluded on grounds of geographical balance when the Board has included only Miami/Ft. Lauderdale, in the entire state of Florida, but includes New York and Buffalo/Niagara Falls in New York, Philadelphia and Pittsburgh in Pennsylvania, Baltimore and Washington, D. C., Kansas City and St. Louis in Missouri, Houston and Dallas in Texas, Seattle, Tacoma and McChord Air Force Base in Washington, San Francisco, Los Angeles, San Diego, Oakland, Long Beach, Burbank, Travis Air Force Base and Norton Air Force Base in California.

"Geographical balance" has very unbalanced application. Some 30% of the population of New England is represented by designation of coterminals, some 33% of the population of the North Central area of the United States, some 60% of the population of the Middle Atlantic area, some 50% of the population of the Northwest, 60% of Alaska's population, almost 90% of Hawaii's population, and virtually 100% of the Pacific area are included in the case by virtue of the mainland coterminal designation and unrestricted consolidation of applications beyond the U.S. mainland. Why then, does the Board include only Miami/

Ft. Lauderdale and Atlanta from the entire Southeastern part of the United States, giving only 16% of the population of Florida, Georgia, North Carolina and South Carolina representation in the case?

If the Board's theory is that "geographical balance" does not exclude cities otherwise meeting the population and passenger criteria but serves to include cities not meeting these criteria which are needed to achieve a "geographical balance", confusion is only compounded. Firstly, since Tampa apparently meets the criteria it should be in the case under this theory. Secondly, why is Portland, which meets neither the population nor passenger production criteria, needed to achieve "geographical balance" when Seattle and Tacoma are in the case? Why is Phoenix, which does not meet the population criteria, included? If Atlanta, Miami or New Orleans are supposed to present Tampa's case, why cannot Los Angeles, Denver and Dallas present Phoenix' case?

This case is too important to accept such a confusing discrimination of the points to be part of the transpacific route structure and those points which are not even to be able to present their cases. As the Supreme Court admonished in *Burlington Truck Lines v. U.S.*, 371 U.S. 156 (1962):

"Expert discretion is the lifeblood of the administrative process, 'but unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.'" p. 167

III

Tampa Has a Legal Right to Be Heard

The Board has allowed virtually every person who had any cognizable interest in this case to intervene *except* the representatives of the traveling public. The Board admitted Aloha Airlines as a full party because of its "obvious competitive interest" in applications of other carriers seeking new authority in Hawaii. J.A. 41. The Board admitted as full parties the Department of Commerce, the Department of Defense, the Secretary of the Interior and the Postmaster General because of their "concern". J.A. 41. The Board admitted as a full party the Master Executive Council of Pan American Pilots because of the interest of Pan American Pilots in "protecting their jobs and job security against the serious threats posed by the applications of almost a score of carriers for authorization to enable them to seek Pan American's traffic and deprive Pan American's pilots of their jobs . . ." J.A. 125.

Indeed, the only "real questions" the Board had as to intervenors were those presented by the "cities and civic groups," (J.A. 41), the representatives of the public, the protection and promotion of whose interest is the Board's only reason for existence! Tampa is not permitted to present its case for transpacific service, although Tampa's competitors, Miami and Atlanta are. Indeed, the Board says that Miami and Atlanta will "adequately protect" Tampa's interest.

The Board does not seriously deny, although it does obfuscate, the fact that Tampa has sufficient interest to be a full party. The Board's denial of Tampa's intervention is based on its claim of necessity to make the proceeding "manageable." As this Court pointed out in *Virginia Petroleum Jobbers Ass'n. v. F.P.C.*, 105 App.D.C. 172, 265 F.2d 364 (1959);

"Efficient and expeditious hearing should be achieved not by excluding parties who have a right to participate . . ." 265 F.2d at 368.

A. In the Orders Denying Intervention, the Board Has a Different Statement of Petitioner's Interest Than in the Consolidation Orders.

This is truly a curious case. The Board has one statement of the scope of the proceeding in its Consolidation Orders, and a different statement in its orders on intervention.

The Board is trying to cut down the size of the case to make it "manageable." It decided to do this by not "considering the extension of domestic routes." J.A. 15. It ordered that "certification of service is to be considered" at only the designated potential mainland coterminal points. J.A. 30.

The Examiner applied this delineation of the scope of the proceeding to requests for intervention, observing that only the potential mainland coterminal points have "a clear and direct interest in the outcome." The "interests" of non-designated points "are more remote." They have only a "general interest in improved service" which, because of the geographic distribution of the potential coterminals can be adequately represented and developed by the potential coterminals. J.A. 42-43.

The Board affirmed the Examiner, but in doing so completely shifted the ground, and, indeed, the scope of the case! While the Order defining the scope of the issues clearly said that "certification of service is to be considered" only at the potential mainland coterminal points, the Order affirming denial of intervention says that the order excluded only *nonstop* service, single-plane service could be certificated. J.A. 145.³⁰

³⁰ In another order issued the same *day*, affirming the scope of the proceeding, the Board refused to permit any "expansion of this proceeding" and expressly consolidated the carriers' amended applications which replaced proposals for extending domestic route systems with routes naming *only* the designated coterminals. J.A. 138, 139.

Under the interpretation that only nonstop service issues are excluded by the designation of mainland coterminals, Tampa obviously has a substantial interest justifying intervention. Tampa will, or will not receive single-plane or single-carrier service to the transpacific depending on what applications are granted. The Board itself stated that this stake in the proceeding was sufficient, under the Board's precedents, to require intervention as a full party. J.A. 143.

As focused by the intervention orders, the Board's position is this:

Tampa has sufficient interest to intervene to contend for single-plane or single-carrier service to the transpacific. Tampa must, however, be denied status as a full party, to make the case "manageable". Tampa can introduce all the evidence it would offer as a full party by limited participation under Rule 14. The air carriers serving Tampa and the cities of Atlanta and Miami may also be expected to introduce the evidence of Tampa's need for transpacific service. The air carriers serving Tampa as well as the cities of Atlanta and Miami can be relied on to proffer findings, conclusions and argument, after the close of the hearing, which will protect and advance Tampa's interest. If Tampa and other similar major cities are permitted to proffer their own findings, conclusions and argument after the close of the hearing, the proceeding will be "unmanageable."

This position is untenable and contrary to law. But it should be noted that it is a different view of the scope of the proceeding than contained in the Consolidation Order which expressly excluded consideration of "extension of domestic routes."

B. The Board's Statement of Saving in Complication and Delay Is Utterly Incomprehensible.

This case, says the Board, is "unmanageable" unless it limits consideration of service to only the designated mainland coterminals. It says that only nonstop service is excluded; single-plane service may

be certificated. Since there is not a commercial airplane in existence or on the drawing boards which could fly a passenger or cargo load nonstop from the East Coast of the United States to any transpacific point involved in this case, there appears to be *nothing excluded!*³¹

The Board complains of the "size and complexity of the record, and the time that would be required to reach a decision in the case." J.A. 143. Only by denying intervention as a formal party to cities not designated as mainland coterminals can the case and the nation be saved from damaging delay. Yet the Board recognizes that, under Rule 14 of its Rules of Practice (14 C.F.R. 302.14), Tampa and any other excluded city can introduce *all* of the evidence it could introduce as a formal party:

"The petitioning [non-designated] communities will, of course, have a full opportunity under Rule 14 to urge the certification of carriers and gateway cities that would make possible single-carrier and single-plane service for them." J.A. 145

Not only can Tampa introduce all the relevant and material evidence it would introduce if granted status as a formal party, but the Board anticipates that Tampa's case and evidence will be introduced by other parties: presumably the air carriers now serving Tampa and the cities Atlanta and Miami. J.A. 145. It is impossible, therefore, to understand how the size or complexity of the record is reduced one whit by excluding Tampa.

What then, does the Board save by denying Tampa intervention? Since briefs to the Examiner and the Board are all filed contemporaneously, the Board saves only the time it would take to read Tampa's brief, or a digest of it prepared by a staff member, and to hear five or ten minutes of oral argument.

³¹ In addition, traffic will not justify nonstop service to Pacific points even if the airplane could make the trip.

This is what this appeal is about: a few *minutes*, in a proceeding which began in 1959, which will not go to hearing until 1967, and which probably will not be decided until 1969. In ten years, a few minutes cannot make any difference.

C. There Is No Realistic Danger to the Case and the Country From Other Non-Petitioning "Major Cities."

The Board cannot, and does not, try to build a factual case for unmanageable size and complexity of the record and serious delay in decision on the basis of what has happened or what would happen. It expresses fright over what might happen, or what it might make happen.

As for what has happened: The Board designated 25 mainland co-terminals, one of them, Atlanta (which is supposed to be vindicating Tampa's interests) *did not petition to intervene and has not been made a party!* The Board designated four cities in Hawaii; only one, Honolulu, sought to intervene. The Board designated three cities in Alaska; only one, Fairbanks, sought to intervene. Only Guam in the entire Pacific has sought to intervene.

How many non-designated cities sought to intervene? Twenty-one, all cities of importance and for whom transpacific service is important. See Appendix C, hereto.

The Board does not really contend that granting intervention to these 21 cities will increase the size and complexity of the case to unmanageable proportions, and delay decision. Nor does the Board contend that cities other than the 21 cities would, in fact, petition to intervene. The Board's case for size, complexity and delay rests on the amazing proposition that if the present petitions were granted, the Board "as a matter of fairness" would have to grant intervention to "numerous other" major cities. J.A. 143.

This is just incredible. There is no reason to believe that "numerous" communities other than those already petitioning, would seek

to intervene. The Board apparently is threatening itself with the prospect of going out and corraling "numerous other communities" to participate in the case.

How it is going to get any participation out of these non petitioning communities is impossible to understand. The Board has not even gotten any participation so far, out of Atlanta and Miami which are designated mainland coterminals.³²

Who are these "other communities" as to whom "fairness" will create an uncontrollable flood? The Board tells us that they are all "major cities of the United States that are now named as points on the domestic routes of one or more of the air carriers which have applications for transpacific authority consolidated into this proceeding." J.A. 143. There are not many "major cities" in the country. One would think that all the "major cities" with an interest in the case have petitioned to intervene. It is hard to find any which have not. Where then are the "numerous" other "major cities" which the Board feels it must, as a matter of "fairness" bring into the case and which will give such size and complexity to the record that the decision will be delayed?

And what will they add to the case as full parties which will not be in it now? No additional evidence and no additional argument, according to the Board's theory that all the evidence and argument will be presented under Rule 14 or by full parties with similar interests.

D. Exclusion of Tampa Is Clearly Contrary to Law.

Involved is the right to hearing: the most cherished and valuable juridical right, and the most jealously guarded by the courts. *Morgan*

³² In the 1959 *Transpacific* proceeding, 46 civic parties intervened, but only 14 filed exceptions and 22 filed briefs or statements of position. Thus, even if cities intervene, it appears that more than half of them do not actively participate.

v. U.S., 298 U.S. 468 (1936); *American Communications Association v. F.C.C.*, 298 F.2d 648 (2d Cir., 1962).

The Board says that Tampa has a sufficient interest to participate (because selection of carrier will determine whether Tampa will or will not receive single-plane service). The Board excludes Tampa only because "other" (unnamed), "numerous" (uncounted), "major cities" might also seek to participate.

This court has held that the Board must consider a community's demand for non-discriminatory service when it certifies service to a competing community. *Greensboro-High Point Airport Authority v. C.A.B.*, 97 App.D.C. 358, 231 F.2d 517 (1956).³³ The Board cannot legally refuse Tampa an opportunity to present its case for trans-pacific service vis-a-vis Miami and Atlanta. Certainly, Tampa cannot legally be forced to rely on Miami and Atlanta to present *Tampa's* case for transpacific air service, when Tampa is in competition with those two cities for air service.

In *City of Houston v. C.A.B.*, 115 App. D.C. 94, 317 F.2d 158 (1963), this Court ruled on a similar but less compelling case than is here presented. Houston's stake in the *American-Eastern Merger Case* was its "fears that National's Florida-California service via Houston would be seriously impaired." Houston's competition with Dallas was the basis for its legal right to intervene in a proceeding

³³ The Court remanded the proceeding to the Board for a "plain answer" to the charge of discrimination resulting from Charlotte, N.C. getting more service than Greensboro in a Board certification proceeding:

"Greensboro's grievance is thus not deprivation of existing service, or even inadequate service, but competitive disadvantage as compared with Charlotte. . . ."

". . . In the instant case, Eastern and Piedmont will presumably meet any demands for service which Greensboro generates. If they do not, Greensboro can raise the matter in a complaint lodged with the Board." 231 F.2d at 521.

"which might affect or vitiate a prior Board decision in which Houston had a 'substantial interest'," (i.e., the *Southern Transcontinental Service Case* in which Houston was named as an intermediate point on a through Florida-California route and Dallas was not). This Court held that Houston had a legal right to voice its objections to a merger which might result in Dallas also becoming an intermediate point on a Florida-California through route:

"In such a situation, Houston has a 'substantial interest' in presenting its side of the case in the proceeding. Essential fairness dictates this." 317 F.2d at 160.

Tampa's interest in presenting its case for inclusion on transpacific routes is as, if not more, immediate and direct than Houston's desire to keep Dallas from getting some of Houston's transcontinental flights. Certainly, "essential fairness" requires that Tampa intervene as a party on equal footing with Miami and Atlanta.

Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608 (2d Cir., 1965) set aside Federal Power Commission orders because the Commission had not received a "complete" record including the "aesthetic, conservational, and recreational aspects of power development," which the Scenic Hudson Preservation Conference sought to advocate. Surely, Tampa's interest in direct transpacific air service is as direct, immediate and substantial as the interests of the Scenic Hudson Preservation Conference.

The representation of consumer interest, which Tampa represents, was recently considered by this Court in *Office of Communication of the United Church of Christ v. F.C.C.*, App.D.C. , 359 F.2d 994 (1966). This Court held that the "obvious and acute concern" of the listening audience required a formal hearing in which the petitioner could present its evidence and argument on the issue of a television

license renewal. Tampa's traveling public has just as "obvious and acute concern," and has a legal right to be heard.³⁴

The Board does not evidence any awareness of the teaching of these cases, although cited to the Board. The Board's view seems to be that even a person with a "substantial interest" may be denied intervention in a big case unless it is "peculiarly situated," (J.A. 143) whatever that means. As shown in Part II C, *supra*, Tampa is just as "peculiarly situated" as other points granted intervention and considered in the case. But assuming Tampa is not "peculiarly situated," there is nothing in the law as laid down in the cases cited above, or in any other case, which permits the Board to deny a full right to be heard to any community with a substantial interest unless it is "peculiarly situated," and is distinguishable from other communities which also may have a legal right to be heard.

The Board seems to believe that the right of a community to present its case for air service applies only where "two nearby communities are vying for authority that the public convenience and necessity may dictate be granted to only one of them." J.A. 144. This is not the legal test for intervention. There is no "*Ashbacker*" rule on intervention: two nearby communities may intervene if each has a substantial interest even if the grant of authority to one city will not preclude the grant of authority to the other, or indeed might assure service to the other. *Cf.*, *International Union, Local 283 v. Scofield*, ___ U.S. ___, 86 S.Ct. 373, 15 L. Ed. 2d. 272 (1965).

³⁴ Other cases enforcing the consumer's right to be heard in agency proceedings are *Bebchick v. Public Utilities Commission of the District of Columbia*, 109 App. D.C. 298, 287 F.2d 337 (1960); *MacArthur Liquors, Inc. v. Palisades Citizens Ass.*, 105 App.D.C. 180, 265 F.2d 372 (1959); *City of Pittsburgh v. F.P.C.*, 99 App. D.C. 113, 237 F.2d 741 (1956); *Reade v. Ewing*, 205 F.2d 630 (C.A. 2, 1953); *U.S. v. Public Utilities Commission of the District of Columbia*, 80 App. D.C. 227, 151 F.2d 609 (1945).

The Board also seems to suggest that intervention can be denied if other parties will press the case of the excluded community. J.A. 145. Each community has its independent view on where the public interest lies and should be able to press it fully. Tampa may want to support one carrier which offers Tampa more service, and Atlanta may support a different carrier. (Atlanta, it has been noted, has not even intervened.)

Nor can Tampa rely on the carriers who serve it. Carriers do not view each point on their system with equal interest. Just as Tampa should not have to rely on what Atlanta or Miami may urge as being in their interest, Tampa should not have to rely on carriers who may not press their applications with the same vigor for myriad reasons, some of which are entirely extraneous to the merits of the particular case (*i.e.*, a carrier may prefer another routing and be willing to "trade off" a routing via Florida to get it).

The Board's case really comes down to the oft-rejected plea that it can deny participation to one with a legal right if there are many others with similar legal rights to participate whose inclusion would result in an "unmanageable" proceeding. This argument has never been accepted by any court. It was carefully reviewed within the last year by this Court in the *United Church of Christ* case, *supra*, and by the Second Circuit Court of Appeals in the *Scenic Hudson Preservation Conference* case, *supra*, and in *American Communications Association v. F.C.C.*, *supra*.³⁵

The considerations which led the courts to comfort the agencies in these cases in their distress over inability to manage proceedings which would be inundated by intervenors are equally applicable here:

³⁵ The Second Circuit had rejected the argument in 1943 in *Associated Industries v. Ickes*, 134 F.2d 694, 707 (2d Cir., 1943). The administrative process has not ground to a halt due to overwhelming petitions to intervene since the *Associated Industries* case.

(1) The expense of litigation operates to limit the number who will apply. In this case, even chosen cities which are "peculiarly situated" and received the blessing of Board designation as mainland co-terminals did not seek to become parties.

(2) The combining of presentations serves to expedite the administrative process.

(3) The Examiner and the Board have laid down numerous ground rules which require written evidence to be circulated in advance of hearing and permit expeditious consideration of evidence and argument.

(4) The Board says it will receive all the evidence and argument either from the excluded intervenors themselves or from others with similar interests; there is nothing extra, therefore, to "manage".

E. Congress Has Evincd Its Judgment Favoring Maximum Receipt of Fact and Argument by All Interested Persons.

An analysis of the Federal Aviation Act and the Administrative Procedure Act shows that Congress wanted the Board to obtain the maximum exposure to varying viewpoints before making decisions in certification cases.

The Federal Aviation Act provides that there must be "due notice" to the public, and "a public hearing" before the Board may issue or amend a certificate of public convenience and necessity for air transportation. Sec. 401(c). The Act expressly authorizes "any interested person" to present argument to the Board in the form of a "protest or memorandum of opposition to or in support of the issuance of a certificate." Sec. 401(c). The same right is guaranteed to "any interested person" with regard to amendment or modification of a certificate. Sec. 401(g).

Congress' intention to assure that the Board Members will hear

all relevant arguments and presentations is further evinced by the broad guarantee in the section governing "Conduct of Proceedings":

"Any *person* may appear before the Board or Agency and be *heard* in person or by attorney." Sec. 1001, emphasis supplied.

That Congress wanted to be sure that the individual Board Members, *in persona*, had the benefit of argument, is emphasized by the mandatory requirement:

"In all cases heard by an examiner or a single member the *Board* shall hear or receive *argument* on request of either party." Sec. 1004(a), emphasis supplied.

The breadth of these directives governing the Board's procedures is highlighted by comparison with the Act's judicial review standard. While "any person," or "any interested person" may present argument to the Board, only a "person disclosing a substantial interest" may seek judicial review. Sec. 1006(a).

A similar attitude or mood favoring broad public participation³⁶ pervades the Administrative Procedure Act. Congress decreed:

"The agency shall afford all *interested parties* opportunity for (1) the submission and consideration of *facts, arguments . . .* where time, the nature of the proceeding and the public interest permit . . ." Sec. 5(b), emphasis supplied.

* * *

". . . So far as the orderly conduct of public business permits, any *interested person* may appear . . .

³⁶ Cf., *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 487 (1951): "It is fair to say in all this Congress expressed a mood. . . . As legislation that mood must be respected. . ."

for the presentation, adjustment, or determination of any issue . . ." Sec. 6(a).³⁷

The Board has denied Tampa status as a party, which means that it is precluded from presenting findings, conclusions, and argument based on the record. Such presentation as Tampa may make is limited to offering evidence and a statement of position *during the hearing*. 14 C.F.R. 302.14. Such restriction is contrary to the Congressional expression, in the above-quoted statutory sections, that the agency heads, the decision-makers, should hear and receive the facts and arguments of all interested persons. Due Process requires no less. *Morgan v. U.S., supra*.

Respectfully submitted,

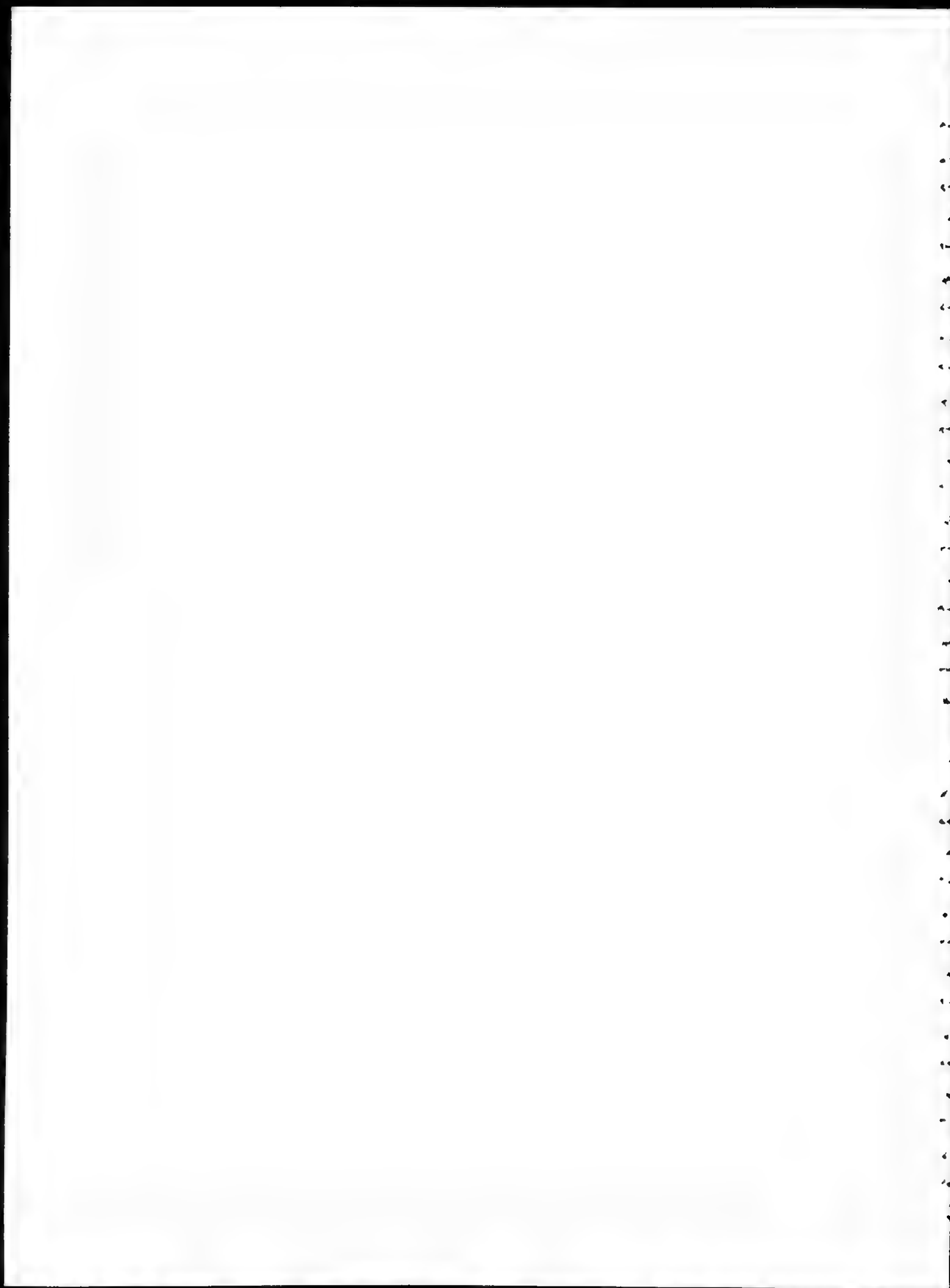
ROBERT M. BECKMAN

1001 Connecticut Avenue, N.W.
Washington, D. C. 20036

Attorney for Petitioners

³⁷ The Senate Report cautioned agencies not to let the problems of conducting proceedings override the rights of any interested persons to present "their cases or proposals in full":

"The qualifying words in the third sentence — which read — 'so far as responsible conduct of public business permits' . . . does not confer upon agencies a discretion to emasculate the subsection or preclude interested persons from presenting fully and before any responsible officer or employee their cases or proposals in full." S. Rep. 752, 79th Cong., 1st Sess. (1945), as reported in S. Doc. 248, 79th Cong., 2d Sess. (1946), p. 205.



APPENDIX A

APPLICABLE STATUTES AND REGULATIONS

1. Federal Aviation Act of 1958, as amended, 49 U.S.C. 1371(c):
Sec. 401(c): "Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate."
2. Federal Aviation Act of 1958, as amended, 49 U.S.C. 1371(g):
Sec. 401(g): "Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate."
3. Federal Aviation Act of 1958, as amended, 49 U.S.C. 1481:
Sec. 1001: "The Board and the Administrator, subject to the provisions of this Act and the Administrative Procedure Act, may conduct their proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice. . . ."
"Any person may appear before the Board or Agency and be heard in person or by attorney."
4. Federal Aviation Act of 1958, as amended, 49 U.S.C. 1484(a):
Sec. 1004(a): "In all cases heard by an examiner or a single member the Board shall hear or receive argument on request of either party."
5. Federal Aviation Act of 1958, as amended, 49 U.S.C. 1485(f):
Sec. 1005(f): "Every order of the Administrator or the Board shall set forth the findings of fact upon which it is based, and shall be served upon the parties to

the proceeding and the persons affected by such order."

6. Federal Aviation Act of 1958, as amended, 49 U.S.C. 1486(a):
Sec. 1006(a): "Any order . . . shall be subject to review . . . by any person disclosing a substantial interest in such order."
7. Federal Aviation Act of 1958, as amended, 49 U.S.C. 1488:
Sec. 1009: "In any proceeding for enforcement . . . it shall be lawful to include as parties, or to permit the intervention of, all persons interested in or affected by the matter under consideration; . . ."
8. Administrative Procedure Act, 5 U.S.C. 1004(b):
Sec. 5(b): "The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments . . . where time, the nature of the proceeding, and the public interest permit. . . ."
9. Administrative Procedure Act, 5 U.S.C. 1005(a):
Sec. 6(a): ". . . So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. . . ."
10. Administrative Procedure Act, 5 U.S.C. 1009(a):
Sec. 10(a): "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

11. 14 C.F.R. 302.14:

§ 302.14 Participation in hearing cases by persons not parties.

(a) *Requests for expedition.* In any case to which the Board's principles of practice, Part 300, are applicable, any interested person, including any State, subdivision thereof, State aviation commission, or other public body, may by motion request expedition of such case or file an answer in support of or in opposition to such motions. Such motions and answers shall be served as provided in § 302.8 hereof.

(b) *Participation in hearings.* Any person, including any State, subdivision thereof, State aviation commission, or other public body, may appear at any hearing, other than in an enforcement proceeding, and present any evidence which is relevant to the issues. With the consent of the examiner or the Board, if the hearing is held by the Board, such person may also cross-examine witnesses directly. Such persons may also present to the examiner a written statement on the issues involved in the proceeding. Such written statements, or protests or memoranda in opposition or support where permitted by statute, shall be filed and served on all parties prior to the close of the hearing.

12. 14 C.F.R. 302.15:

§ 302.15 Formal intervention.

(a) *Who may intervene.* (1) Any person who has a statutory right to be made a party to a proceeding shall be permitted to intervene therein.

(2) Any person whose intervention will be conducive to the ends of justice and will not unduly impede the conduct of the Board's business may be permitted to intervene in any proceeding.

(b) *Considerations relevant to determination of peti-*

tion to intervene. In passing upon a petition to intervene, the following factors, among other things, will be considered: (1) The nature of the petitioner's right under the statute to be made a party to the proceeding; (2) the nature and extent of the property, financial or other interest of the petitioner; (3) the effect of the order which may be entered in the proceeding on petitioner's interest; (4) the availability of other means whereby the petitioner's interest may be protected; (5) the extent to which petitioner's interest will be represented by existing parties; (6) the extent to which petitioner's participation may reasonably be expected to assist in the development of a sound record; and (7) the extent to which participation of the petitioner will broaden the issue or delay the proceeding.

(c) *Petition to intervene*—(1) *Contents.* Any person desiring to intervene in a proceeding shall file a petition in conformity with this part setting forth the facts and reasons why he thinks he should be permitted to intervene. The petition should make specific reference to the factors set forth in paragraph (b) of this section.

(2) *Time for filing.* Unless otherwise ordered by the Board, any petition for leave to intervene shall be filed within the following time limits:

(i) In a proceeding where the Board issues a show cause order proposing fair and reasonable mail rates, such petition shall be filed within the time specified for filing notice of objection.

(ii) In all other proceedings, including mail rate proceedings where no show cause order is issued, the petition shall be filed with the Board prior to the first prehearing conference, or, in the event that no such conference is to be held, not later than fifteen (15) days prior to the hearing.

(iii) A petition to intervene in any Board proceeding filed by a city, other public body, or a chamber of com-

merce shall be filed with the Board not later than the last day prior to the beginning of the hearing thereon.

A petition for leave to intervene which is not timely filed shall be dismissed unless the petitioner shall clearly show good cause for his failure to file such petition on time.

(3) *Answer.* Any party to a proceeding may file an answer to a petition to intervene, making specific reference to the factors set forth in paragraph (b) of this section, within seven (7) days after the petition is filed.

(4) *Disposition.* The decision granting, denying or otherwise ruling on any petition to intervene may be issued without receiving testimony or oral argument either from the petitioner or other parties to the proceeding.

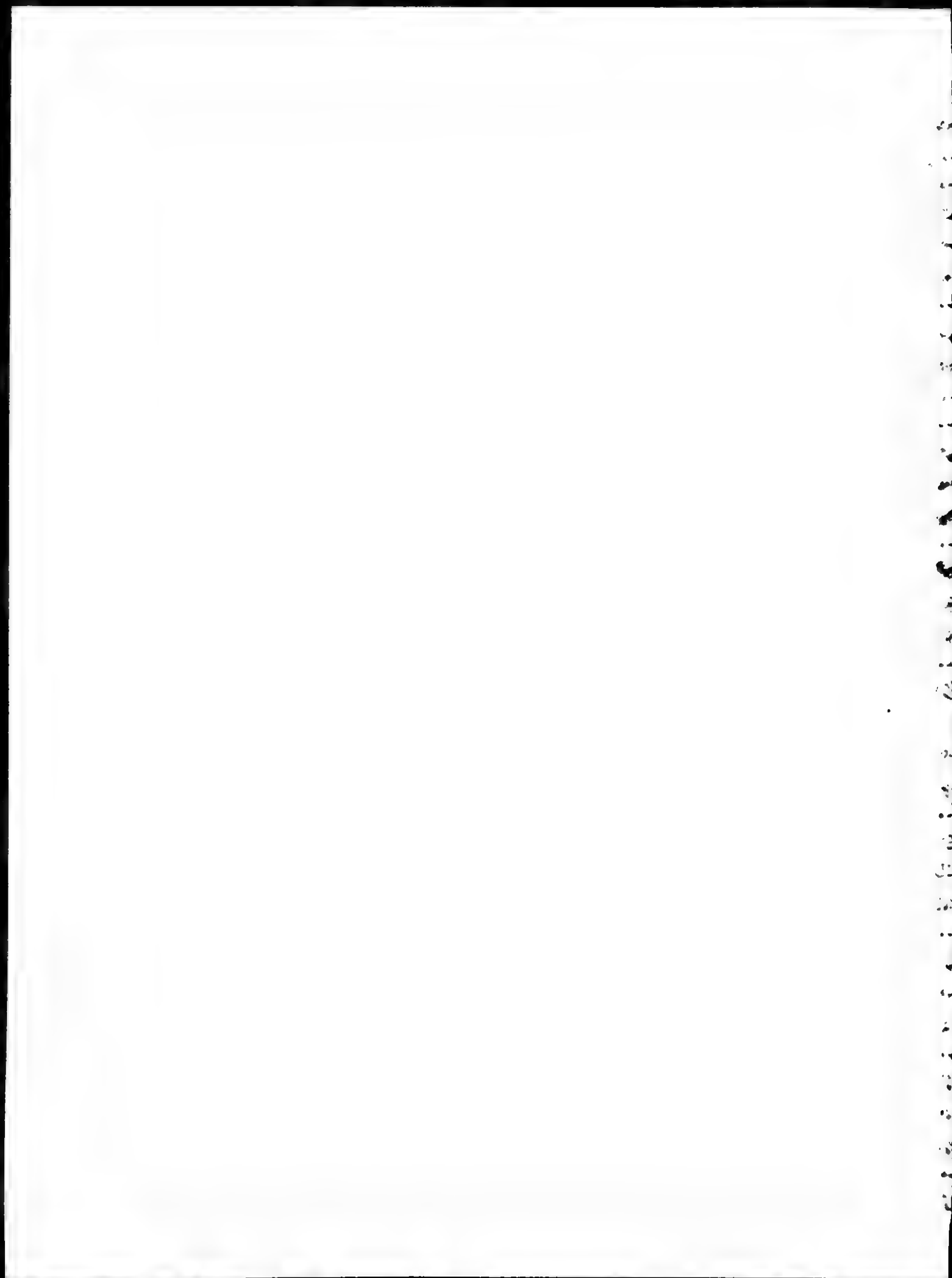
(d) *Effect of granting intervention.* A person permitted to intervene in a proceeding thereby becomes a party to the proceeding. However, interventions provided for in this section are for administrative purposes only, and no decision granting leave to intervene shall be deemed to constitute an expression by the Board that the intervening party has such a substantial interest in the order that is to be entered in the proceeding as will entitle it to judicial review of such order.

13. 14 C.F.R. 302.930:

Conduct of Route Proceedings

§ 302.930 Evidence in route proceedings.

(a) *Route authority not specifically applied for.* Applicants for certificate authority under section 401 of the Act may not introduce, in support of awards to them of route authority, evidence which does not support service to the points, routes or areas specifically described in their applications pursuant to § 201.4(c) (3) and (4) of this chapter.



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APPENDIX B

**CIVIL AERONAUTICS BOARD
Washington, D. C. 20428**

October 20, 1966

**Transpacific Route Investigation
Docket 16242**

NOTICE TO ALL PARTIES:

Tampa. The Tampa parties have filed a motion requesting a "ruling" concerning certain evidentiary matters.

Questions of evidence are dependent in turn upon the issues, which in this case should be self-evident from the Board's prior orders. The Board is considering herein applications seeking new route authority to engage in air transportation between some 25 specified U.S. coterminal points, on the one hand, and points beyond in the Pacific, on the other hand. Tampa was not designated as a potential coterminal, and therefore no air carrier could be authorized in this proceeding to provide nonstop service between Tampa and Hawaii or points beyond. The question of possible new single-carrier or single-plane services for Tampa depends on whether a particular carrier, which holds existing domestic route authority at Tampa, receives new transpacific authority which in combination will permit that result.

The Examiner has no intention of making anticipatory and declaratory rulings at this juncture of matters of evidence. Except to the extent that the foregoing reiteration of the nature of the issues may prove of some assistance to the Tampa parties, the motion is denied.

Wisconsin. In the earlier notice of September 26, 1966, all par-

ties were requested to serve copies of their exhibits and other filings upon San Antonio and Tampa during the pendency of court proceedings seeking review of the Board's action in denying them the status of intervenors herein.

Subsequently a similar judicial review proceeding was instituted by the State of Wisconsin.^{1/} It is requested that Wisconsin also be served with exhibits and other filings at the following address:

George B. Schwahn, Esq.
Assistant Attorney General
State of Wisconsin
Madison, Wisconsin 53702
(two copies)

As in the case of San Antonio and Tampa, Wisconsin will be added to the service list for receipt of documents from the Board in connection with this proceeding.

/s/ Robert L. Park
Hearing Examiner

^{1/} State of Wisconsin v. C.A.B., C.A.D.C., No. 20,500.

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APPENDIX C

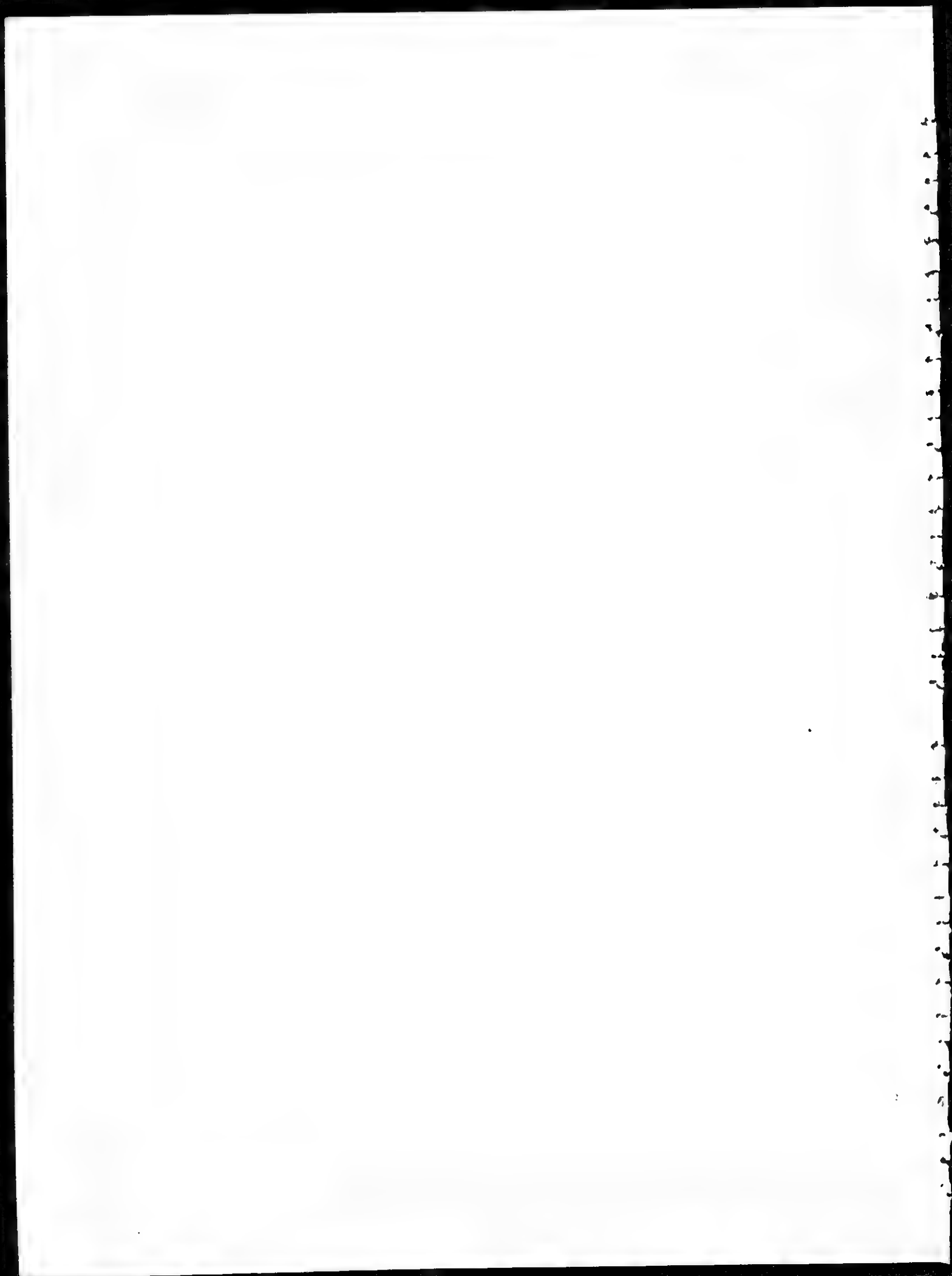
	Metropolitan Area Population (000)		Domestic O & D Passengers				International O & D Passengers			
	1960	1965	Rank	1960	Rank	1964	Rank	1960	Rank	1964
<u>Continental U.S. Cities Being Considered</u>										
New York/Newark	12,384	13,211	1	10,003,490	1	14,239,280	1	1,346,274	1	1,835,904
Los Angeles/Long Beach/Burbank	6,743	6,918	3	4,476,560	3	6,567,690	3	298,170	2	520,416
Chicago	6,221	6,703	2	5,397,180	2	7,762,080	5	189,954	6	243,452
Philadelphia, Pa./Camden, N.J.	4,343	4,719	9	1,762,280	9	2,620,410	10	63,090	9	178,262
Detroit	3,762	3,997	8	2,132,030	8	2,828,790	9	63,762	10	98,602
San Francisco/Oakland	2,783	3,030	4	3,103,680	5	4,556,080	4	237,804	3	391,704
Boston	2,589	3,236	7	2,489,480	6	4,037,750	7	172,860	5	248,048
Pittsburgh	2,405	2,428	12	1,487,520	12	2,068,900	17	34,836	16	57,442
St. Louis	2,060	2,277	13	1,272,460	14	1,842,760	19	30,738	21	37,904
Washington, D. C.	2,002	2,393	5	2,947,870	4	4,638,370	8	126,480	8	189,298
Cleveland	1,797	2,057	10	1,638,900	11	2,186,510	14	40,890	15	61,778
Baltimore	1,727	1,873	31	563,710	22	1,104,460	20	27,744	11	72,990
Dallas/Ft. Worth	1,657	1,973	11	1,547,550	10	2,318,130	18	34,038	19	48,084
Minneapolis/St. Paul	1,482	1,623	15	1,168,340	15	1,721,330	13	44,682	13	68,360
Seattle/Tacoma	1,429	1,584	16	1,075,410	18	1,424,810	6	179,424	7	242,476
Buffalo/Niagara Falls	1,307	1,414	20	848,280	25	1,017,530	22	26,004	26	33,534
Miami/Ft. Lauderdale	1,269	1,549	6	2,838,820	7	3,420,690	2	425,010	4	390,242
Houston	1,243	1,719	19	952,420	17	1,516,940	12	45,636	14	65,172
Kansas City	1,039	1,218	18	983,440	19	1,395,260	27	17,946	29	26,296
San Diego	1,033	1,202	28	597,480	28	855,290	30	16,476	25	33,944
Atlanta	1,017	1,189	14	1,233,570	13	1,981,360	29	16,680	28	26,466
Denver	929	1,116	17	1,043,520	16	1,566,040	23	24,630	20	38,798
New Orleans	868	1,018	23	729,400	21	1,130,790	15	37,746	18	49,880
Portland, Ore.	822	895	26	612,690	27	858,200	11	50,496	12	69,486
Phoenix	664	870	24	630,070	24	1,056,940	36	10,464	36	18,234
<u>Alaska/Hawaiian Cities Being Considered or Granted Leave to Intervene</u>										
Anchorage	122(B)	136								
Cold Bay	NA	NA								
Fairbanks	13(A)	NA								
Honolulu	500	601								
Hilo	26(A)	26(A)								
Kahului	4(A)	NA								
Lihue	4(A)	NA								
<u>Continental U.S. Cities Not Granted Leave to Intervene</u>										
Cincinnati	1,072	1,383	22	766,700	26	997,840	28	17,190	30	23,174
Hartford/Springfield	1,004	1,408	34	471,310	34	716,010	24	21,168	22	37,724
Providence/Pawtucket	816	823	50	281,590	52	380,470	39	9,048	39	13,080
TAMPA/ST. PETERSBURG	772	913	21	822,190	23	1,078,980	21	27,180	24	34,456
Louisville	725	793	32	555,650	31	753,470	43	7,110	49	8,976
Indianapolis	698	1,001	25	626,140	29	827,570	33	11,076	34	18,814
Dayton	695	814	33	512,630	35	653,250	38	9,606	38	16,152
San Antonio	687	816	36	458,820	36	641,710	25	19,956	23	35,944
Columbus, Ohio	683	864	30	565,950	32	744,380	31	13,338	37	17,708
Albany/Schenectady/Troy	658	705	46	325,220	50	393,550	46	6,138	43	11,862
San Jose	642	903	108	77,640	109	112,360	(C)	312	(C)	548
Memphis	627	770	37	451,270	30	754,790	47	5,850	50	8,388
Rochester, N.Y.	586	823	39	422,540	38	610,150	32	11,262	33	19,486
Syracuse	564	617	35	469,580	40	593,210	34	10,998	32	19,538
Oklahoma City	512	607	44	334,630	45	489,730	44	6,690	44	11,782
Tulsa	419	456	45	327,540	47	424,620	41	7,966	45	11,080
Nashville	400	518	43	384,210	42	559,460	(C)	3,762	(C)	6,328
Knoxville	368	393	63	186,750	60	281,710	(C)	3,210	(C)	4,238
Spokane	278	291	58	214,420	62	263,540	37	9,744	42	12,340
Tucson	266	328	57	216,760	59	297,260	(C)	3,786	(C)	5,530
Little Rock	243	278	73	142,400	64	242,560	(C)	1,920	(C)	2,302

(A) Urban population

(B) 3d Judicial Division population at 1/1/61. The 3d Judicial Division is now considered the Metropolitan Area of Anchorage by Sales Management.

(C) Not among top 50 cities

Source: 1960 Census of Population, U.S. Summary, Bureau of Census
 Sales Management, Survey of Buying Power, May 10, 1961 and June 10, 1966
 CAB Airline Traffic Surveys



APPENDIX D

Portion of Total Pacific Area Population Being Considered
in the Trans-Pacific Route Investigation

<u>Pacific Areas</u>	<u>Estimated Total</u>	<u>Population (000) Being Considered</u>	<u>Percent of Total</u>
Hawaii	734	734	100%
Japan	95,899	95,899	100%
Cambodia/Laos	7,825	1,925	25%
Hong Kong	3,133	3,133	100%
India	460,490	460,490	100%
Korea (South)	26,868	26,868	100%
Malaysia	9,053	9,053	100%
Okinawa (Ryukyu Islands)	883	883	100%
Pakistan	98,612	98,612	100%
Philippines	30,241	30,241	100%
Taiwan	11,696	11,696	100%
Thailand	28,835	28,835	100%
Viet Nam	33,117	33,117	100%
Australia/New Zealand	13,454	13,454	100%
Guam	67	67	100%
Indonesia	100,045	100,045	100%
Samoa	134	20	15%
Tahiti (Society Islands)	76	76	100%
Oceania	1,948	366	19%
Other Far East	<u>46,730</u>	<u>23,735</u>	<u>51%</u>
Total	969,840	939,249	97%

FOR BINDING

REPLY BRIEF FOR PETITIONERS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,464

GREATER TAMPA CHAMBER OF COMMERCE, ET AL.,
Petitioners

v.

CIVIL AERONAUTICS BOARD,
Respondent

ON PETITION FOR JUDICIAL REVIEW OF ORDERS
OF THE CIVIL AERONAUTICS BOARD

United States Court of Appeals
District of Columbia

FILED DEC 14 1966

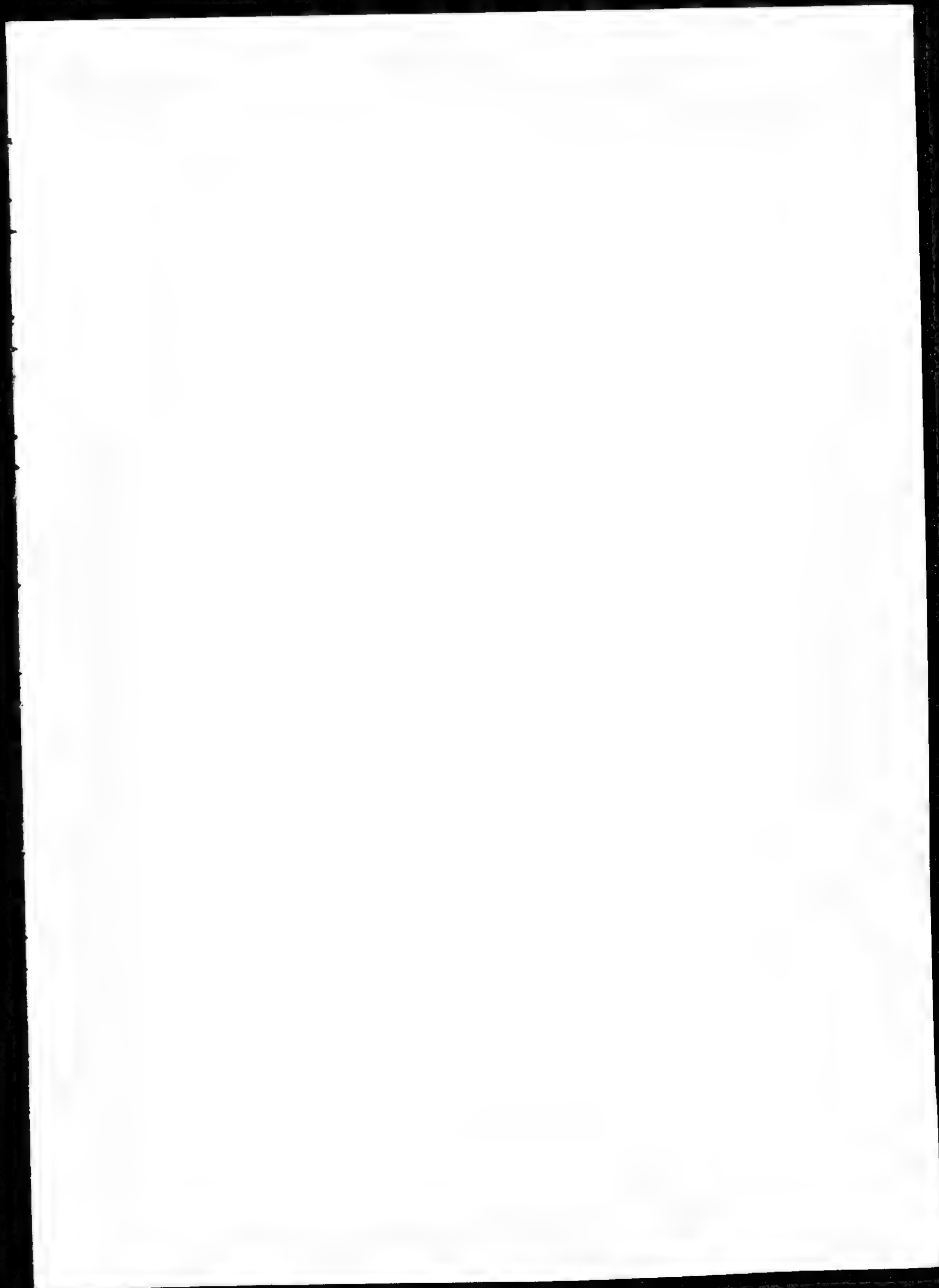
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CLERK

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Washington, D. C. 20036

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OF THE CIVIL AERONAUTICS BOARD

REPLY BRIEF FOR PETITIONERS

INTRODUCTION

The Board's answering brief does not dispute that Tampa meets the Board's population and traffic generation criteria for designation as a mainland point. The Board's plea for unreviewable discretion in "drawing the line" is thus irrelevant: *taking the line where the Board claims to have drawn it, Tampa should be included in the case.*

Moreover, since the Board has determined that the southeast part of the country needs to be represented in the case, and neither of the two cities designated to represent the southeast, Atlanta and Miami, has filed any exhibits, consideration of Tampa is doubly required — to present its own claim for inclusion on the transpacific routes of tomorrow and to be the only civic voice for the 17.6 million citizens of the southeast.

As for intervention, the Board has virtually conceded. The Board founds its defense of denial of intervention upon a judicially-rejected, restricted view of the right to intervene, and the demands of "efficiency". "Substantial interest", as developed by the standing to appeal cases, determines the legal right to intervene before an agency. The Board does not dispute that Tampa has such a "substantial interest", as of course it does.

I

THE BOARD CONCEDES TAMPA MEETS BOTH CRITERIA FOR DESIGNATION

The Board did not meet the challenges to its exclusion of Tampa as a designated point other than to plead that the Board has unusually broad discretion to define the scope of a proceeding. Accepting everything the Board says about the necessity and difficulty "to draw a line somewhere" (Board Br., p. 29), Tampa is within the area of the line as the Board drew it. Tampa meets both criteria the Board has established for inclusion within the case: one million population and top 25 in domestic passenger generation. Tampa must, therefore, be a designated coterminal.

While the Board's Consolidation Order indicated to the contrary (J.A. 16), the only reason Tampa could imagine for its exclusion when it apparently met both criteria, was that the Board might be excluding

a point otherwise meeting the criteria for reasons of "geographical balance". Tampa claimed this was arbitrary and illegal.¹ The Board does not now say that Tampa was excluded on grounds of "geographical balance", but affirms that "geographical balance" served to include cities not otherwise meeting the criteria, *e.g.*, Phoenix. (Board Br., p. 37)²

There is thus no conceivable basis for not including Tampa in the *Transpacific* case. Tampa, like Miami, and in international air traffic superior to Atlanta, is a "primary traffic and population center in the South." (J.A. 16) Moreover, Atlanta has not even intervened and Miami has announced it will present no direct exhibits. If the Southeast part of the United States is to get any representation, it must be by Tampa.

The Board's only argument on this point appears to be its assertion that meeting one or the other of the two criteria was not "treated by the Board as automatically entitling a city to be designated", giving illustrations of two non-designated points with populations in excess of one million: Cincinnati and Hartford/Springfield, and one non-designated point which ranks in the top 25 in domestic passenger generation: Las Vegas. (Board Br., p. 37)

While Cincinnati and Hartford/Springfield meet the population criteria, neither are in the top 25 domestic passenger producing points. (Cincinnati ranked 26th in 1964 and Hartford/Springfield ranked 34th.) While Las Vegas ranked in the top 25 in domestic passenger produc-

¹Tampa's Brief, pp. 25-26.

² If "geographical balance" were urged as a reason for excluding a point otherwise meeting both criteria, the Board would have had to come to grips with the fact that the southeast is the least-represented area in the country, exacerbated by neither Atlanta nor Miami presenting any direct case for transpacific service. The Board states that this is "wholly beside the point" (Board Br., p. 37, n. 33), as it may be as long as "geographical balance" does not exclude cities which meet both the population and traffic criteria.

tion, its 1960 population was 229,300 and its population will not reach 400,000 by 1970 at its 1960-65 rate of growth.

Thus, even accepting the Board's view that meeting one or the other criteria is not sufficient, there is no reason and no reason is offered for excluding Tampa which meets *both* criteria. However broad may be the Board's discretion in delineating the scope of the proceeding, and however scanty may be the required explanation of its adoption and application of the two criteria of population and passenger generation (Board Br., pp. 23-25, 31-34), agency discretion is not so broad nor is the requirement for explanation so minimal, as to sustain the exclusion of Tampa which *meets both criteria*. This is arbitrary and capricious agency action, and must be set aside.³

Considering Tampa, which meets both criteria, will not "place in issue the needs of every city in the United States" (Board Br., p. 38). It will consider the needs of the *one* city in the United States which meets both of the Board's criteria for inclusion but was not included.

II

THE BOARD HAS NOT MET ANY OF THE CHALLENGES TO ITS CONSOLIDATION ORDERS

The Board has not even attempted to defend its failure to find, as required by Congress in Section 1001 of the Federal Aviation Act, that the selected delimitation of the scope of the proceeding is "conducive to the proper dispatch of business and to the ends of justice". Indeed, the Board appears to feel that it may act in an unjust manner if it wants to. (Board Br., p. 35)

³*City of Lawrence, Mass. v. C.A.B.*, 343 F.2d 583, 588 (C.A. 1, 1965); *Boston and Maine R.R. v. United States*, 202 F. Supp. 830 (D.C. Mass., 1962), *aff'd per curiam*, 373 U.S. 372. Agency adherence to its own criteria is strictly enforced to avoid constitutional problems of excessive delegation of legislative power. *Kent v. Dulles*, 357 U.S. 116 (1958).

The Board makes no effort to defend its failure to find, affirmatively, that consideration of Tampa and other major cities *would* result in an "unmanageable" proceeding. It not only stands silently on finding no more than expansion to other mainland cities "could" produce an unmanageable proceeding,⁴ but on Brief, the Board appears to concede that the proceeding is manageable. Not one word is said in defense of the claim of "unmanageability".

Similarly, the Board's Brief does not explain or defend the findings that exclusion of Tampa and other interested major cities is *required* because the proceeding is "large", "complex", and "time-consuming".⁵ Virtually all of the Board's major route cases are large, complex and time-consuming, but the Board has heard, and is now hearing cases involving *over 100* cities. No need appears to limit this case to 25 cities. The Board could readily manage 72 mainland points. (Board Br., p. 26)⁶

The Board's rhetorical reassertion that "it requires no demonstration that a proceeding of such proportion would be exceedingly complex" (Board Br., p. 26), is not argument or explanation. Moreover, it most certainly does require demonstration that this proceeding would be exceedingly complex when the very same sentence goes on to show that the imagined complexity largely resolves itself because "many of the mainland points" have "relatively light traffic potential".

⁴Such a finding is legally inadequate. *Hall v. F.C.C.*, 103 App. D.C. 248, 257 F.2d 626, 628 (1958).

⁵The only reference in the Board's Brief to the need for speed is the "high priority" assigned by President Johnson (Board Br., p. 33). As high or higher priority was assigned by President Eisenhower in 1959, but the case is not decided yet. If this is such a "high priority" case, why did the Board wait four years to institute it, one year to issue a consolidation order, and another year to start hearings?

⁶Indeed, the Board claims their needs will be "fully and exhaustively considered" as "beyond" area points. Board Br., p. 45.

The Board recognizes the dilemma it created for itself by, on the one hand, excluding the issue of "service" to Tampa in the name of manageability, but on the other hand, claiming that it would consider single-plane service issues between Tampa and the transpacific as well as receive and consider all the evidence and argument Tampa would offer, either from Tampa itself during the hearing, or from the cities in Tampa's area (Atlanta and Miami) and the carriers who serve Tampa, after the hearing. The Board says that it will consider Tampa, but the consideration given Tampa will not be as "searching and complicated" as that given the designated points because Tampa's is "beyond" area service and the Board "does not determine whether service to 'beyond' points is *required* . . ." (Board Br., pp. 26-27, Board's emphasis).

This is not only a weak response, but an incorrect one. It is certainly metaphysical at best to divine the difference between the quality of consideration given an "important element in determining whether the public convenience and necessity require the certification" (Board Br., p. 19), and the determination of whether service to "beyond" points is "required". In the practical terms of managing a case, there is virtually no difference, and none is claimed. Exhibits are filed, testimony offered, briefs submitted and digested, oral argument attended.

The alleged quality or extent of an individual Board Member's thought processes cannot be the basis for limiting a proceeding. What may be taxing for one man, may actually simplify decision for another. The claim that the individual Board Members may have to think a little harder about Tampa if it is a designated coterminal than if it is not, is unprovable. Moreover, this is a doubtful basis, at best, for sustaining these Board orders, because the Board would resist, as an outrage, any inquiry into the quality and extent of its thought processes.⁷

⁷*United States v. Morgan*, 313 U.S. 409, 422 (1941), overruled such an inquiry by a court into an administrator's mental processes. Thus, the Board cannot properly or fairly urge that their minds will be overtaxed by any procedure other than the one they adopted, when this entire subject has been barred from judicial scrutiny.

In any event, the Board is wrong in claiming any difference between the character of consideration or how hard it thinks about a "beyond" area point. The Board's statement that "the Board does not of course determine whether the public convenience and necessity require service to the 'beyond' points," (Board Br., p. 19), is directly contrary to its holding in the *Service to Phoenix Case*, 26 C.A.B. 193 (1957), in which the Board made clear that the public convenience and necessity issues are not only the same, but an award of a new route within the area may be predicated entirely on "beyond" area needs:

"Thus, if a carrier proposes to add a new segment between C and D to its existing route which extends between A, B, and C, the need for service between A and the new point D may justify the award of the new segment between C and D even though no need for local service between C and D has been shown." 26 C.A.B. at 198, n. 16.

In its Brief to this Court, defending this holding, the Board said:

"There is no suggestion that these 'beyond' proposals and service needs were intended for consideration only in selection of carrier after public convenience and necessity for operations over each proposed new segment had otherwise been established. Rather, these matters were recognized for what they were, *proof of public convenience and necessity for certification*. C.A.B. Brief in *Frontier Airlines, Inc., et al. v. C.A.B.*, C.A.D.C. No. 14,232 Feb. 14, 1958, p. 25. Emphasis supplied.

* * *

"The extent to which reliance is placed on 'beyond' benefits obviously varies from case to case, depending on all the circumstances involved. Here, the Denver-Phoenix-San Diego award rested in part on such benefits; and the Phoenix-Los Angeles segment *entirely thereon*. As we view the matter the question is not whether the service needs to be filled by certification are 'within' or 'beyond' area ones, but rather whether these needs justify certification." *Ibid.*, p. 29 (Emphasis supplied)

In *Frontier Airlines v. C.A.B.*, 104 App. D.C. 78, 259 F.2d 808 (1958), this court sustained the Board's position saying:

"The Board points to many instances in which it has considered beyond area benefits in determining whether the public interest requires the route sought. Without elaborating these contentions it is sufficient to say that we think the needs of beyond area traffic may in many factual situations be a proper concern in the problem of establishing new air routes. In many situations we do not see how it could be otherwise" 259 F.2d at 810.

Thus, under the Board's view of this proceeding, there is not only no cognizable difference between considering the "requirement" for service, for instance, between Los Angeles (a designated point) and Hawaii, as compared to the "requirement" for service between Tampa (a non-designated point) and Hawaii. Indeed, under the *Service to Phoenix Case*, as sustained in *Frontier Airlines v. C.A.B.*, a carrier could be certificated in the *Transpacific* case between Los Angeles and Hawaii entirely on the basis of a need or requirement for service between Tampa and Hawaii with no requirement for additional service between Los Angeles and Hawaii. It is clear that the quality of consideration is not different for "beyond" or "designated" points. It is conceivable that *more* consideration, argument and weight could be given to a "beyond" point than a designated point.

The Board is still impaled on the horns of its dilemma. The contention that exclusion of Tampa is necessary to make the proceedings manageable founders on the Board's own claim that Tampa is in the case as a "beyond" point. If it is a "beyond" point, it is very much, even decisively, in issue. There is no basis for excluding Tampa from all the benefits of being a designated mainland coterminal point: non-stop authority and inclusion on the routes of carriers not already serving it.

III

IT IS STILL NOT CLEAR WHETHER TAMPA
IS IN OR OUT OF THE CASE

The Board, in its Brief, has not helped the confusion on whether, and to what extent, service to Tampa is being considered. The Board completely ignores its expressions of urgent need to exclude consideration of service and traffic to or from mainland points other than the designated points in order to make the case "manageable". (J.A. 15) The Board now claims that it never intended to exclude issues of service or traffic other than "nonstop" service. (Board, Br., p. 5)

This interpretation is not supported by the Board's Order, nor even by the defense of it in the Board's Brief.

A. There Is More Involved Than Nonstop Service.

The Board says that reference in the Consolidation Order to "direct Pacific service" means "nonstop service". (Board Br., p. 5) Yet the Board's own Brief recognizes that this is not all that is involved in designation as a potential mainland coterminal, by a long-shot.

Even if single-plane transpacific service by extension of the routes of applicant domestic carriers can be provided (which is by no means clear), only the designated mainland points are being considered for new single-plane service by international and domestic carriers applying for new mainland points. (Board Br., p. 2, n. 1) In other words, only a designated point such as Miami or Atlanta, can get single-plane transpacific service from Pan American or Western, but Tampa cannot.

Despite the Board's noting in the newspaper that President Johnson jet flew nonstop from Washington to Honolulu (Board Br., p. 3, n. 6), it is not really disputed that there is no aircraft in existence or on the drawing board which can operate nonstop with a commercial load from the east coast of the United States to any of the transpacific points in

the case, except the domestic point Honolulu." Thus, the opportunity to obtain single-plane service is vital, and not just by a domestic carrier which is already serving Tampa. Tampa ought to be able to present its case for inclusion on the transpacific routes of tomorrow, no matter which carrier is selected. It should not be restricted to hoping for extension of the domestic routes of one of its present carriers.⁹

B. The Board Said Quite Definitely That It Would Not Consider "Extension of Domestic Routes".

It is by no means clear that Tampa can get direct transpacific service even by extension of the domestic routes of one of its present carriers. The Board's Brief absolutely ignores the Board's clear and basic determination that

"... we are equally convinced that such expansion [of the points to be considered] should not be accomplished ... by considering the extension of domestic routes, either to Hawaii or beyond." (J.A. 15)

It was by not "considering the extension of domestic routes" that the Board intended to avoid "a proceeding of unmanageable proportions" and "serious delay". (J.A. 15)

The Board must have thought it was excluding more than nonstop service. If nonstop service were all that it thought it was excluding, it certainly would have said so instead of saying that the 25 selected cities were the cities it related to "foreseeable future service requirements" (J.A. 16), that the 13 selected cities east of the West Coast gateways produce a reasonable balance of "traffic" (J.A. 17), that with regard to

⁸ In addition, traffic would not support very many nonstop frequencies from the southeastern points.

⁹ As pointed out in Part IV, *infra*, Tampa's only direct southern transcontinental carrier to the west coast, National Airlines, is not supporting its application for Pacific routes beyond Hawaii.

further procedures, the designated coterminals were "the points of the United States mainland that would be involved" (J.A. 29), and that it was ordering "the potential mainland points at which certification of service is to be considered . . ." (J.A. 30)

The Board clearly was trying to exclude issues of "service" and "traffic" at points other than the designated 25 points, else the concern about "unmanageable proportions" and "seriously delay our reexamination" makes no sense. Nonstop flights to Hawaii could not spell the difference between manageability and non-manageability, or between expedition and serious delay. The Board meant what it said, i.e., "direct service" and "traffic" from other than the selected 25 mainland points was not "involved". Its claim now that it always meant "direct nonstop service" is not credible, nor true: only the selected 25 cities, by virtue of carriers amending their applications to conform to the Board's order, can receive single-plane service from carriers which do not now serve them. In view of the relatively light traffic to support non-stop frequencies, this single-plane service by applicants other than a city's existing carriers is one key to the case.¹⁰

The Board's Brief ferrets out a sentence from the Board's discussion of stopover rights, where it said that a carrier which now had such rights under existing authority would, of course, be able to exercise them, and other applicants could get stopover rights for trans-pacific traffic "at mainland coterminals". (J.A. 25-26) The Board's Brief ties this sentence into a discussion of the general scope of the proceeding and on this sentence bases its claim that it always intended to consider the extension of domestic routes. (Board Br., pp. 7, 18)

¹⁰Tampa filed a Motion on October 28, 1966, saying that if this is what is involved, let the Board say so, and let the carriers refile their applications to conform to a proceeding so defined. The Examiner dismissed the Motion without referring them to the Board.

This, however, is contrary to what the Board said (J.A. 15), and contrary to its intention of not considering "traffic" or "service" from other than the designated points to make the case "manageable."

If Tampa and the other points are "involved", and if their traffic and service is to be considered as the Board now claims it always intended, then this Court should remand the proceeding, and order the Board to permit Tampa to be considered on an equal basis with the other cities in the country which also have one million population and are among the top 25 domestic passenger producers. If the other cities meeting these criteria can be included on the routes of successful carriers other than their existing carriers, so should Tampa.

C. No Two Parties Agree on the Interpretation of the Consolidation Order.

The Board's Brief is the only place the obscure sentence on stop-over rights is claimed to clarify the scope of the proceeding. While the Board has said in its intervention orders¹¹ that extension of domestic routes to permit single-plane transpacific service is in issue, these orders do not rely on or refer to the "stopover" discussion. The Board's Brief in this Court appears to confirm Tampa's belief that the *Consolidation* Order controls the scope of the proceeding, not the *Intervention* Order, as assumed by virtually all the other parties.

The Board's Bureau of Operating Rights did not see the *Consolidation* Order as being so crystal clear, and did not mention the "stop-over" discussion as clarifying it. The Bureau relies on the intervention order. In an answer to Tampa's Motion for Clarification, the Bureau said,

¹¹ N.B., the Consolidation Orders themselves have never been clarified and Tampa's efforts to request clarification have been dismissed.

"It is conceivable that prior to the issuance of the intervention order legitimate questions may have existed as to whether the Board in its limitation of 'direct' service to designated coterminals intended to preclude such operations [*i.e.*, combining existing domestic authority with requested international authority]." Answer of the Bureau of Operating Rights, p. 3, November 8, 1966. Docket 16242.

Finally, even the three consolidated Petitioners before this Court differ in their interpretation of the Board's orders. Wisconsin (No. 20,500) sets forth its conclusion that the Consolidation Order applied to "nonstop pacific services" to or from the designated coterminals. (Brief, p. 7) San Antonio (No. 20,383) believes that in the Consolidation Order, "The Board as a matter of fact concluded that San Antonio had no need for transpacific service in the foreseeable future." (Brief, p. 6). Tampa maintains that the Board's Consolidation Order is not clear and "there should be no room for this dispute. Courts ought not to have to speculate as to the basis for an administrative agency's conclusion." *Northeast Airlines v. C.A.B.*, 331 F.2d 579, 586 (C.A. 1, 1964).

The matter of whether or not Tampa is or is not in the case and to what extent, is critical. This should be clear. The Board's Brief has only added to the confusion by relying on an obscure sentence discussing stopover rights which no other party, including the Board in its orders, relied on.¹²

¹² The Board, in a footnote, raises the contention that some of Tampa's legal objections to the Consolidation Order were not presented in its Petition for Reconsideration to the Board. (Board Br., p. 21, n. 15) To the extent this is true, it should be noted that Tampa's petition was not prepared by a lawyer, but by the Manager of the Department of Traffic and Transportation of the Greater Tampa Chamber of Commerce (J.A. 83), who could not be expected to know the legal principles set forth in Tampa's Brief to this Court. This, we submit is "reasonable grounds for failure to do so" within the meaning of Sec. 1006(e) of the Federal Aviation Act, and the contentions should be considered by this Court.

IV

THE BOARD'S DEFENSE OF ITS DENIAL OF INTERVENTION
HAS BEEN JUDICIALLY REJECTED

The Board's defense of its denial of intervention is virtually a concession that it has legally erred. The Board does not even mention, let alone dispute, answer or distinguish the guiding legal principal applied to Board intervention as well as other agency intervention cases: "substantial interest" as determined by standing to appeal governs the *right* to intervene before the agency.¹³

The Board's argument, that petitioners have "assumed" a statutory right to intervene under section 401(c) of the Federal Aviation Act (Board Br., pp. 15, 38), is an attack on a "straw man".¹⁴ Petitioners' right to intervene is based on the judicial construction of the right to judicial review, guaranteed by Section 1006(a), to "any person disclosing a substantial interest in such order." It is also based on Sec. 6(a) of the Administrative Procedure Act.¹⁵

¹³ *Seaboard & Western Airlines v. C.A.B.*, 86 App. D.C. 64, 181 F.2d 515, 518 (1949): "It is not disputed that one who may appeal may intervene." *Office of Communications of United Church of Christ v. F.C.C.* ___ App. D.C. ___, 359 F.2d 994, 1002 (1966): After citing cases "granting the consuming public standing to challenge administrative action",

"These 'consumer' cases were not decided under the Federal Communications Act, but all of them have in common with the case under review the interpretation of language granting standing to persons 'affected' or 'aggrieved'."

See *International Union, Local 283 v. Scofield*, ___ U.S. ___, 86 S. Ct. 373, 15 L.Ed.2d 272 (1965).

¹⁴ The Board, in a footnote, adverts also to Sec. 1001. (Board Br., p. 38, n. 35) The Board does not develop any argument based on the "conduct its proceedings" provision. Perhaps because it never made the findings required by this section: "conducive to the proper dispatch of business and to the ends of justice". In any event, *American Communications Association v. United States*, 298 F.2d 648, 650 (2d Cir., 1962), disposed of this point.

¹⁵ *American Communications Association v. United States*, *supra*.

The Board does not deny that Tampa has a "substantial interest". Indeed, the Board so found in one of the orders subject of review. (J.A. 143) Accordingly, the denial of the right to intervene must be set aside.

The Board contends, again contrary to judicial declaration, that the question is "whether the Board abused its discretion" in limiting formal city intervention to the designated potential mainland coterminals. (Board, Br., p. 41) The Board has no discretion to deny intervention to parties with a substantial interest as Tampa clearly has, in the name of "efficient conduct" of its proceedings. *American Communications Association v. United States*, 298 F.2d 648 (2d Cir., 1962); *Virginia Petroleum Jobbers Association v. F.P.C.*, 105 App. D.C. 172, 265 F.2d 364, 367-68 (1959).

The Board's claim that it is "impossible to draw a precise line between those interests which justify intervention" as a formal party under Rule 15 and those which are limited to participating at the hearing under Rule 14 (Board Br., pp. 40-41) is obfuscation at best. The Board has already conceded that wherever the line is drawn, Tampa would, under the Board's own precedents, be granted leave to intervene under Rule 15. (J.A. 143)

Moreover, to the extent that the Board is right that Rule 14 permits a party to "have his views made known" and "to develop the facts" (Board Br., p. 40), nothing is gained by excluding Tampa as a full party. In fact, participation limited to adducing evidence, such cross-examination as the Examiner may permit, and a statement of position during the hearing, is not equivalent to submitting proposed findings, conclusions and argument after the hearing to the Examiner, and more importantly, arguing to the actual decision-makers, the Board Members themselves. As this Court said in *Office of Communication of United Church of Christ v. F.C.C.*, *supra*,

"We cannot believe that the Congressional mandate of public participation which the Commission says it seeks to fulfill was meant to be limited to writing letters to the Commission, to inspection of records, to the Commission's grace in considering listener claims, or to mere non-participating appearance at hearings." 359 F.2d at 1004.

The Board's two main grounds to justify its denial of intervention, the necessity for a speedy decision in the case (J.A. 143) and the adequacy of other parties' presentations of Tampa's case (J.A. 144) are almost abandoned in its brief. There is no claim of substantial delay in decision resulting from civic presentation: the Board's Brief refers only to the "practical impact" upon "the efficient conduct of the proceeding". (Board Br., pp. 38, 40) The adequacy of other parties' presentations of Tampa's case is supported only by an assertion that it is "inconceivable" that it would not be "fully and exhaustively considered". (Board Br., p. 45; see also p. 41, n. 38)

Nor does the Board come to grips with the dilemma posed by these two defenses. If all the evidence and argument Tampa would present will be "fully and exhaustively" presented and considered, how can there be any significant "practical impact" in permitting Tampa to make its own presentation and argument?

The Board's assertion that submission of briefs simultaneously with all the other parties and a few minutes of oral argument "could lead to utter chaos" (Board Br., p. 42) exceeds rhetoric license. Similarly, the claim that the Board avoids being "bogged" down with the "mass of briefs and additional argument" (Board Br., p. 40) is only a metaphor, and inapt, because the Board does not read all the briefs. Its staff digests the briefs.¹⁶

¹⁶This procedure was recognized and approved in *Morgan v. U.S.* 298 U.S. 468, 481 (1936).

Moreover, most civic parties are, as a practical matter a diminishing factor in Board proceedings. As shown by the original proceedings in the *Transpacific* case, while 46 civic parties were granted leave to intervene, only 14 filed exceptions to Examiner's Recommended Decision and only 22 filed briefs, or statements in lieu of briefs to the Board. 32 C.A.B. at 1035-37.

The same diminished participation is already apparent in this case. Of the 25 chosen U.S. mainland cities, only 24 even petitioned to intervene.¹⁷ Only 22 of the 25 have filed direct exhibits.¹⁸ Hardly any of the numerous Pacific points have intervened or filed exhibits.

The final defense, that Tampa's interests will be adequately presented by other parties, is no defense. Congress intended that every interested person should be able to present its case in full.¹⁹

The facts of this proceeding to date demonstrate how important it is for Tampa to present its own case in full. While the Board argues that it is "inconceivable that the relevant needs of the particular geographical areas in which the petitioners are located will not be fully and exhaustively considered" by virtue of the presentations of the air

¹⁷Atlanta did not petition to intervene.

¹⁸Miami, Pittsburgh and Atlanta filed no direct exhibits.

¹⁹See Tampa's opening brief, pp. 37-39. The Board is incorrect in claiming that a city has a right to intervene only where it may lose existing service or where it competes with another city already a party. (Board Br., p. 46) As this court made clear in *Greensboro-High Point Airport Authority v. C.A.B.*, 97 App. D.C. 358, 231 F.2d 517 (1956), the claim to equal service or opposition to another city's obtaining more service must be fully considered. This Court recently rejected "rigid adherence to a requirement of direct economic injury" in *Office of Communication of United Church of Christ v. F.C.C.*, *supra*, 359 F.2d at 1002. The right to intervene before Courts of Appeals in NLRB cases by the successful parties in Board proceedings was recently illuminated in *International Union, Local 283 v. Scofield*, *supra*. In any event, Tampa does compete with Miami and Atlanta for air service and for connecting air passengers. Transpacific flights at Miami and Atlanta might well preclude such flights also being offered at Tampa.

carriers and other civic parties, and that with regard to Tampa, Miami "will undoubtedly produce evidence" relating to Tampa's "importance as a population center and traffic generator" (Board Br., pp. 45, 46-47), here is what has happened already:

1. Neither of the two designated cities to represent the southeast, Atlanta or Miami, is presenting any direct exhibits. Atlanta has not intervened, and Miami waived its right to present direct exhibits.

2. National Airlines, Tampa's only direct southern transcontinental carrier to the west coast, has failed to support its application for Pacific routes beyond Hawaii.

3. Some of the air carriers serving Tampa, *e.g.*, National and Delta, do not even identify Tampa traffic in their exhibits, but lump it with "other" or "tributary" traffic.

Here is the nub of the case. To the extent that the Board's complaint about receiving "additional argument" from the excluded petitioners²⁰ constitutes a recognition that Tampa has arguments to present which will not be presented by other parties, it reveals the real role of a civic party in a route case:

While the presentation of many, perhaps most civic parties is limited (and these parties, by virtue of the limitation of their presentation, do not add materially to the record or the post-hearing argument), there are a few parties, like Tampa, who will effectively contend for the public convenience and necessity requirements as they see them. The air carriers, for tactical or other reasons, may give up pressing a route request during, or more frequently, after the close of the hearing (as National has already done in the submission of its direct exhib-

²⁰Board Br., p. 40.

its). As long as funds available to press the case hold out,²¹ the representative of the public will not give up its insistence that the convenience and needs of the public be met. Congress' determination that route decisions be made upon public hearing can be supported in no better way than by this Court's direction to the Board that the public's representative be given a full and unfettered place in this Board proceeding.

Respectfully submitted,

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²¹ "... legal and related expenses of administrative proceedings are such that even those with large economic interests find the costs burdensome." *Office of Communication of United Church of Christ v. F.C.C.*, *supra*, 359 F.2d at 1006.

OFFICE COPY

PETITIONER'S BRIEF

UNITED STATES COURT OF APPEALS

For the District of Columbia Court

No. 20,500

390

STATE OF WISCONSIN,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

ON PETITION TO REVIEW ORDERS OF THE CIVIL AERONAUTICS BOARD

United States Court of Appeals
for the District of Columbia Circuit

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

FILED OCT 26 1966

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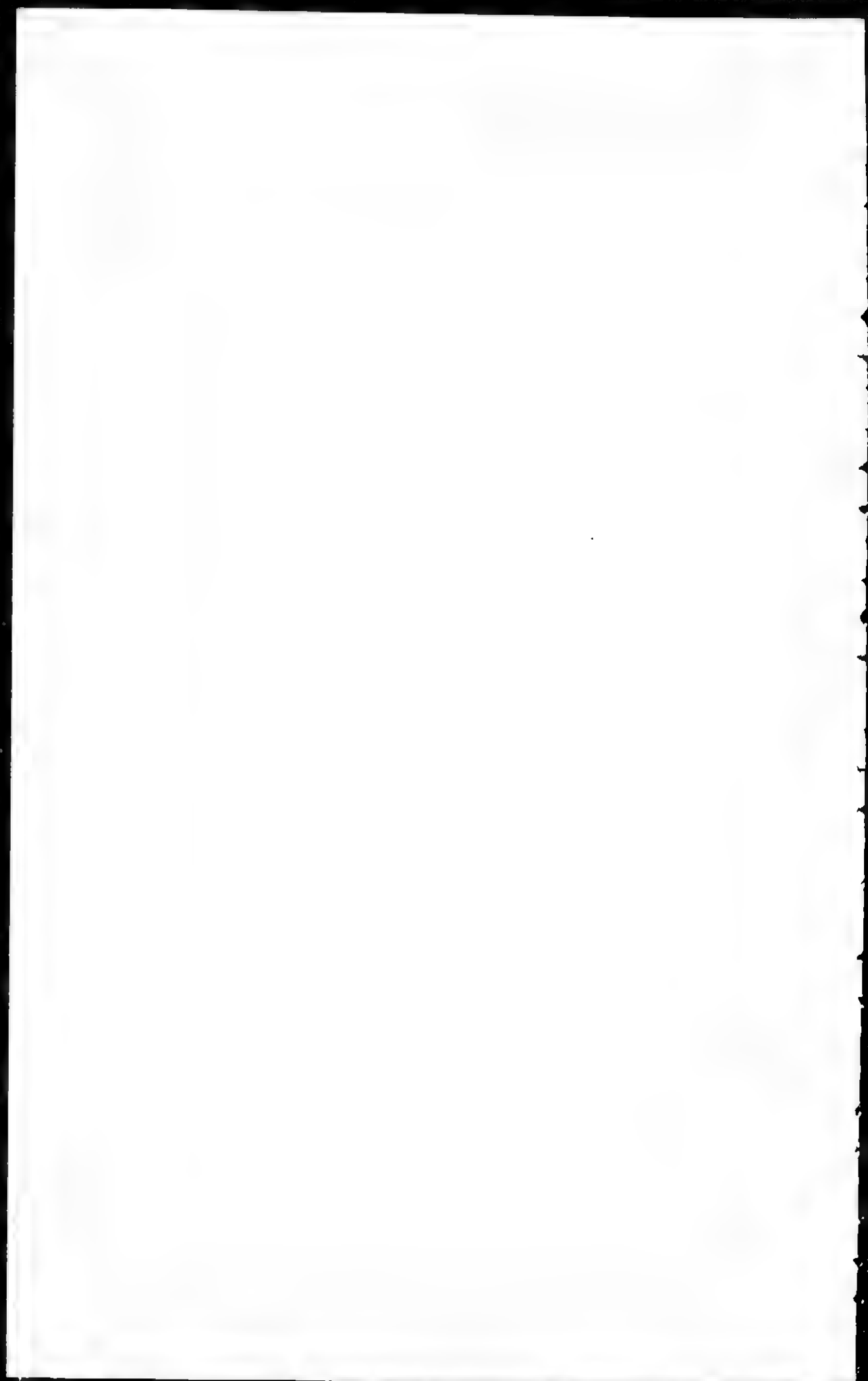
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QUESTIONS PRESENTED

1. Can the Civil Aeronautics Board, in a route proceeding under the Federal Aviation Act intended to determine the long-range air service pattern between United States cities and the Pacific area, deny a sovereign State of the United States of America the right to intervene as a party on the grounds (1) that denial will expedite the proceedings and that (2) other parties will adequately represent the State's interest, where the State has shown (1) that it has a substantial interest and that its interest is greater than some of the parties granted intervention and (2) that its interests are in conflict with others granted intervention.

2. Can the Board reverse its policy with respect to intervention by civic parties in its proceedings without notice, opportunity for comment or findings of fact.

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In The
UNITED STATES COURT OF APPEALS
For the District of Columbia Court

No. 20,500

STATE OF WISCONSIN,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

**ON PETITION TO REVIEW ORDERS OF THE
CIVIL AERONAUTICS BOARD**

BRIEF FOR PETITIONER, STATE OF WISCONSIN

JURISDICTION

On June 13, 1966, within the time permitted by Respondent's Rule of Practice, the State of Wisconsin filed with the Respondent a Petition for Leave to Intervene in the *Investigation*. By Order E-23910 of July 7, 1966, issued under delegated authority the Board denied Wisconsin's Petition to Intervene. On July 25, 1966, the Petitioner filed a Petition for Review of Order Denying Petition to Intervene with the Board. The Board by Order E-24082 of August 13, 1966, affirmed the earlier order.

On October 10, 1966, the State of Wisconsin filed a timely petition under Section 1006 of the Federal Aviation Act of 1958, as amended, 72 Stat. 795, 49 U. S. C. 1486 and Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009, praying that this Court review orders E-24082, E-23740, E-23741 and E-23910 and, on such review, hold unlawful and set aside said orders and direct the Board to give Petitioner status as a party in the *Transpacific Route Investigation*. The State of Wisconsin, at this time, prays that this Court review Order E-24082, and orders E-23740, E-23741 and E-23910, only insofar as they were relied upon by the Respondent in adopting Order E-24082, and on such review, hold unlawful and set aside Order E-24082 and direct the Respondent to give Petitioner status as a party in the *Transpacific Route Investigation*.

STATEMENT OF THE CASE

On June 15, 1965, the Respondent, Civil Aeronautics Board, entered Order No. E-22314 instituting a proceeding under Section 401 of the Federal Aviation Act of 1958, as amended, providing for:

"* * * the examination of the pattern of operations by United States carriers in foreign and overseas air transportation in the Pacific and for the consideration and disposition of applications with respect to such air transportation." (J. A. 4)

This proceeding, entitled *Transpacific Route Investigation*, is, in part, a continuation of an earlier proceeding concerned with Pacific services, namely the *Transpacific Route Case*, Civil Aeronautics Board Docket No. 7723, et al., which has previously been before this Court. Petitioner, the State of Wisconsin was a party to that earlier proceeding by virtue of its petition to intervene therein, granted by the Civil Aeronautics Board in its Order E-14428, dated September 4, 1959 (a copy of the order is attached as Appendix A to this brief).

Following institution of the new *Investigation*, and in accordance with customary procedures, the Board received applications from twenty airlines (carriers) and five cities (J. A. 13) requesting consideration of specific applications for certificate authority to authorize services between the Continental United States and Hawaii and Pacific points (J. A. 35-40). Included among the applications were those of Flying Tiger (J. A. 156), American Airlines (J. A. 157) and United Airlines (J. A. 159) which sought authority to include Milwaukee, Wisconsin on their Pacific routes. In addition, there were included among the applications.

those of two additional airlines that already serve Milwaukee, Northwest Airlines (J. A. 158) and Eastern Airlines (J. A. 157), that could, if their requests were granted, provide service between Milwaukee and Pacific points via other "gateway" cities within the Continental United States. Furthermore, if the applications of United Airlines or Northwest Airlines, both of which are certificated to serve Milwaukee, were granted the said carriers could carry local traffic, i.e., Milwaukee, between designated coterminals, since they already possess the necessary route authority required by Order E-23740 (J. A. 17).

Seventy corporate, civic or governmental authorities filed petitions for leave to intervene with the Board at or prior to the time appointed by the Board for receiving applications.

On May 25, 1966, the Civil Aeronautics Board issued two Orders in the *Investigation*. One, entitled "Consolidation Order", determined which applications would be considered in the *Investigation* (E-23740) (J. A. 13 et seq.). It also determined which mainland United States cities would receive consideration for designation on airline routes as "coterminals"—cities to or from which non-stop Pacific services could be operated; twenty five mainland United States cities were so included.

The other order (E-23741), entitled "Order Granting and Denying Intervention" (J. A. 41 et seq.), issued under delegated authority, determined, that formal party states should be extended only to mainland cities (and related state and civic groups) which are being considered for designation as coterminals.¹

Within the time permitted by Respondent's Rule of Practice, the Petitioner State of Wisconsin filed with the Respondent a Petition for Leave to Intervene (J. A. 60-78) in the *Investigation*.² The Petition recited the interest of the State of Wisconsin in the *Investigation*, including the State's statutory concern with public airports in the State, its investment therein, and the statutory duty of the State, through its instrumentality, the Wisconsin State Aeronautics Commission, to supervise aeronautics in the State and to promote and foster a sound development of aviation in the State (J. A. 60-61).

The Petition of the State to the Board further recited the key role of the airport at Milwaukee, Wisconsin, in the State's airport system (J. A. 61), recited Milwaukee's size, the size of Milwaukee's "metropolitan area", and Milwaukee's "effective buying income", all recited both absolutely and relative to the 25 communities granted intervention and potential "coterminal" status (J. A. 61). The recitations showed Milwaukee to be larger than several of the cities granted intervention, and co-terminal consideration. Petitioner's pleading also recited the fact that Milwaukee's traffic to and from Pacific points exceeded that of other cities that were granted "coterminal" consideration and leave to intervene (J. A. 62). These recitals were supported by exhibits setting forth all the facts relied upon (J. A. 65-71).

Petitioner further recited the fact it has had service available to it to and from the Pacific since as long ago as

¹The petition for intervention of the City of San Antonio, one of the Petitioners in the consolidated review proceeding before this Court, in No. 20383, was denied by the order cited in the text.

²The petition was dated June 10, 1966 and filed with the Respondent on June 13, 1966.

1958 (so-called one-carrier, direct connecting service) (J. A. 62 and 63).

The Petition further alleged the adverse interest of Milwaukee *vis-a-vis* Chicago, the nearest proposed co-terminal included in the *Investigation*, from the standpoint of surface distance, airport and air traffic congestion and travel costs.

The facts recited, and substantiated by exhibits, were supported by an affidavit of an official of the State of Wisconsin, the director of the Wisconsin Aeronautics Commission (J. A. 72).

By Order E-23910, dated July 7, 1966, issued under delegated authority, the Board denied Wisconsin's Petition to Intervene. The entire discussion of Petitioner's case was as follows:

"In order E-23741, the Examiner set forth the standards used in granting and denying intervention to states, cities and related civic groups. Upon consideration of the present petitions and application of those standards, it is found that all of the * * * petitioners in the state and civic category, with the Exception of Columbus, Indianapolis, Tampa and the State of Wisconsin, have sufficient interest in this proceeding to justify their participation as parties." (J. A. 124)³

Thereafter, the State of Wisconsin filed with the Civil Aeronautics Board a Petition for Review of Order Denying Petition to Intervene.⁴ In the petition to the Board, Wisconsin reiterated the facts cited in its Petition to Inter-

³The order referred to in the quotation appears at J. A. 41.

⁴The petition was dated July 21, 1966 and filed with the Board on July 25, 1966.

vene, argued Board precedent, argued the conflict of Milwaukee's interest with that of Chicago, contended that the prejudice to Wisconsin was irrevocable, and relied upon a prior decision of this Court, *City of Houston, Texas v. C. A. B.*, 317 F. 2d 158 (1963), in support of its argument. The Petition for Review to the Civil Aeronautics Board recited additional factual data, based on information in Respondent's files (J. A. 140), establishing that its interest is more substantial than that of other cities which Respondent had permitted to intervene. Included in the allegation was specific reference to Petitioner's traffic experiences (J. A. 140).

Respondent by Order E-24082, affirmed the action denying Petitioner intervention in the *Investigation* (J. A. 142). The Board's entire discussion of Petitioner's case was as follows:

"Upon consideration of the matters presented the Board has determined to exercise its right to review and, upon such review to affirm the Examiner's denial of intervention of petitioners. The contentions raised by the petitions are essentially the same as those considered and rejected by the Board in Order E-23990, dated July 20, 1966. We find no error in the Examiner's disposition of these requests for leave to intervene." (J. A. 142)⁵

The Respondent, in denying Petitioner's request for intervention in the *Investigation*, both in the order issued under delegated authority and in the later affirmation of that staff action, relied upon guidelines laid down in earlier orders in the *Investigation*. The denial of Wisconsin's

⁵Order E-23990 appears at J. A. 148.

petition to intervene in the first instance rested upon "standards" set forth in the earlier Order Granting and Denying Intervention (E-23741) issued before Wisconsin filed its petition with the Board. That order had limited participation by civic intervenors to representatives of mainland communities considered for coterminal status. The justification rested on the size and complexity of the *Investigation*, considered against the priority attached to it by the President and the Board (J. A. 42); coupled with this was the view that other participants would adequately represent the excluded communities, which, in any event, could participate at hearing under Respondent's Rule 14, and were excluded only from presenting written and oral argument (J. A. 42-43).

The final order denying Petitioner's request for intervention (in the form of a petition for review filed with the Board), rested similarly upon another order, Order E-23990, disposing of petitions of other communities (including San Antonio, now before this Court), an order adopted before Petitioner Wisconsin had even filed its Petition. Order E-23990 (J. A. 148 et seq.) noted that the interest of the cities dealt with single carrier and single plane service to and from the Pacific over routes of carriers already authorized to serve such cities. The Board observed that "under other circumstances" cities so situated would be granted leave to intervene (J. A. 149).

The Board nevertheless denied intervention, reiterating its earlier observations concerning the size and complexity of the *Investigation*, the similarity of interest of major cities across the nation located on existing routes, and the desire for early disposition of the proceeding

(J. A. 149-50). The Board specifically rejected claims of "discrimination" by another city excluded (San Antonio) *vis-a-vis* cities included (J. A. 150). It held that existing parties—cities and air carriers would adequately protect and develop the interests of excluded cities (J. A. 150) and held that grant of intervention in an earlier proceeding with identical issues was not binding in this proceeding.

STATUTES INVOLVED

The statutes involved are Section 1006 of the Federal Aviation Act of 1958, as amended, 72 Stat. 795, 49 U. S. C. 1486, and Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009. These sections are printed in Appendix D hereof.

STATEMENT OF POINTS

1. The Respondent erroneously denied Petitioner status as a formal party in its proceeding.
2. The Respondent erroneously concluded that other civic parties could adequately represent Petitioner when the relevant party has interests in conflict with Petitioners.
3. The Respondent ignored binding precedent established by this Court with respect to civic party rights.
4. The Respondent's decision in Petitioner's case was contrary to Respondent's established precedent and such precedent was overruled and policy changed in this proceeding without notice, opportunity for timely comment or findings on Petitioner's claims.

SUMMARY OF ARGUMENT

This case is controlled by this Court's decision in *City of Houston, Texas v. C. A. B.*, 317 F. 2d 158 (1963). The Board has granted intervention in the *Transpacific Route Investigation* to Chicago interests, *inter alia*, and denied intervention to Wisconsin on behalf of the State and its largest city, Milwaukee, on the grounds that other parties will adequately protect Wisconsin's interest. Yet Wisconsin contended before the Board that Transpacific service to Milwaukee at Chicago is not only inadequate, because of the time involved and the cost of surface travel to and from Chicago's O'Hare Airport, but also because the increase in schedules to Chicago's congested O'Hare Airport entails extensive air traffic and airport congestion while depriving Milwaukee of the balanced pattern of service necessary to meet the air service requirements of Milwaukee and Wisconsin air passengers. Wisconsin is entitled to intervention to protect the rights it now has at Milwaukee to single carrier and single plane service to and from the Pacific on two airlines now certificated between Milwaukee and the Pacific and to urge the selection of additional carriers now certificated to Milwaukee for new Pacific routes that may be granted in this case. Not only will other parties fail to represent Wisconsin's interests adequately; their interests are or may be adverse.

The Board, in denying intervention to Petitioner admittedly departed from its own precedent. Board precedent permits intervention on behalf of a "beyond" community, a community which generates traffic flowing through one or more "gateways" involved in a route proceeding. The Board's sole justification for departing from its preced-

ent was the need for expedition. The "expedition" obtained, however, by denying intervention is minimal because the only additional procedural steps entailed are the right to file briefs and make oral argument. Considered against the importance of a route case that will fix service patterns for years, the minimal "expedition" obtained by depriving Wisconsin of its rights does not justify the Board's arbitrary action.

The Board departed from its own precedent, moreover, without notice to Wisconsin, without providing Wisconsin an opportunity to comment on the new standards or guidelines being established for intervention, and without making any findings on the factual allegations made by the State. Yet Wisconsin established in its petition to intervene that the standards employed by the Board for granting potential "coterminal" status would have justified consideration of Milwaukee, Wisconsin's largest city, as a potential "coterminal" along with the 25 cities included in the proceeding. The Board's failure to make findings on these allegations is error.

ARGUMENT

The question in this case is whether the Petitioner, the State of Wisconsin, will be permitted to intervene on behalf of its citizens, and in its own right, in a Civil Aeronautics Board proceeding that is designed to establish for years to come the pattern of air service to be fixed between cities in the United States and the entire Pacific area.

I.

Milwaukee, the principal city in Wisconsin, its air "gateway" is the Nation's 11th largest city (J. A. 61, 65) and its 16th largest metropolitan area (J. A. 61, 69). It receives air service through the General Mitchell Field, located at Milwaukee. Milwaukee is certificated on the routes of 6 airlines including four that are applicants for Pacific authority in the *Investigation* (Eastern, Northwest, United and Flying Tiger). Two of these, United and Northwest, already hold Pacific authorization and provide Milwaukee single carrier connecting service to Hawaii and the Far East (J. A. 62-63). Milwaukee has had direct air-carrier connection service to the Pacific as long ago as 1958 (J. A. 62). It has participated in earlier Transpacific route investigations as a party, granted intervention by the Board, including the last preceding case which led to the instant *Investigation* (J. A. 63).

The Respondent Civil Aeronautics Board denied requests by airline applicants to include Milwaukee as a possible "co-terminal" in this *Investigation*, despite the fact that Milwaukee met the standards of size and traffic gen-

eration employed by the Respondent in determining which cities would be considered (Order E-23740).

Milwaukee is larger than 15 cities included by the Board as potential co-terminals (J. A. 65), its rank among the nations cities is increasing and especially relative to other cities being considered (J. A. 66-67). Its potential, measured in "effective buying income" is greater than 10 of the 25 points included by the Board. Milwaukee's recorded traffic to and from the Pacific is greater than that of 3 of the cities included (J. A. 71); recorded traffic to and from Hawaii is greater than 5 of the cities (J. A. 140). Milwaukee would rank 9th among all mainland cities in Pacific traffic if all the traffic originating and terminating in Milwaukee, including those using the Chicago airport, would be included (J. A. 140).

The Board's failure to include Milwaukee as a potential co-terminal was erroneous. Injury was added to error when the Board then proceeded to deny intervention to any community (and related state and civic groups) not included among the 25 being considered for co-terminal status (E-23741). The injury and error was compounded when the Respondent denied intervention to others on the grounds that communities or those in the civic category not permitted to intervene would be adequately represented by communities in the same geographic area that are parties, as well as by carriers authorized to serve such cities that are also applicants in the *Investigation*.

II.

Chicago is the party-community that is presumably in the same geographic area as Milwaukee. Wisconsin, in its pleadings before the Board alleged, and supported its allegation, that Chicago could not represent the interests of Wisconsin or Milwaukee—that its interests were in conflict (J. A. 137, 139). Wisconsin pointed out that Chicago is the world's busiest air terminal, and the most congested, both by air traffic and terminal traffic, promotion of the Chicago service increases that congestion and makes use of Chicago by Wisconsin residents less efficient. Wisconsin pointed out that service at Chicago entailed undue surface travel for residents of the Nation's 11th largest city and other Wisconsin travellers, adding greatly to the travel time and cost of journeys to and from Wisconsin. Wisconsin pointed out its position of long-standing, expressed in other recent proceedings before the Board, as well as here, that so long as it is forced to rely on air service at Chicago for service in major markets, the overall quality of Wisconsin's air service suffers. None of these facts was contested.

III.

This court, in similar circumstances arising in the Civil Aeronautics Board's *American-Eastern Merger Case* held that the Board must grant intervention and party status, *City of Houston, Texas v. Civil Aeronautics Board*, 317 F. 2d 158 (1963). There Houston was denied intervention, while Dallas/Ft. Worth was granted intervention, despite Houston's claim that Dallas/Ft. Worth's interests were

in conflict with Houston's and that grant of substantive relief to Dallas/Ft. Worth might be prejudicial to Houston. This court reversed the Board.

Wisconsin's position before the Board in this matter is virtually on all fours with Houston's in *City of Houston, supra*. Wisconsin's position with respect to Chicago, moreover, is a matter of record with the Board, it having been an issue in another recent Board proceeding, *American Milwaukee Deletion*, CAB Docket No. 14924 where the prejudicial aspects of service for Wisconsin at Chicago were extensively litigated in relation to service to the South and Southwest (St. Louis, Dallas and Los Angeles, *inter alia*). Wisconsin invited the Respondents attention to *City of Houston case, supra*, in its pleadings in this *Investigation* citing the facts relied upon to draw the parallel. The Board did not consider the analogy and made no findings on the factual allegation.

IV.

The Respondent arbitrarily departed from its own precedent in excluding Wisconsin. In 1963 the Commonwealth of Puerto Rico filed a petition for leave to intervene in the *Reopened Southern Transcontinental Service Case*, Docket 7984, *et al.* The preceding involved the certification of a carrier to serve the route between Miami/Ft. Lauderdale and Fort Worth/Dallas. Puerto Rico was certificated on the system of one of the applicants, but was a "beyond" or "off-segment" point. The Examiner denied Puerto Rico's petition for leave to intervene because of

this reason." The Board, however on petition for review reversed the Examiner's decision, and stated:

"Puerto Rico is thus a significant source of back-up traffic to the route under investigation in this proceeding. Moreover, Puerto Rico is served by one of the carrier applicants herein, and an award to that carrier could substantially affect the nature of the service available between Puerto Rico and the points involved in this proceeding." Order E-20427, February 3, 1964.⁷

Even were Wisconsin and Milwaukee to be consigned solely to Chicago for Pacific services, intervention would be justified under the Board's Puerto Rico doctrine. We submit that *a fortiori* Wisconsin must be granted intervention where it is not only a "beyond" point, but a point already on routes of carriers with Pacific authority. Furthermore, the Board in Order E-23740, at page 4 thereof stated:

"This provision would not, of course, preclude a successful applicant from carrying local traffic between designated mainland coterminals if it already possesses domestic route authority between the points involved."
(J. A. 17)

The board would not apply the *Puerto Rico* doctrine here. It concluded that the need for expedition outweighed the interest of "beyond" communities. Yet the "expedition" obtained by excluding the communities is the sacrifice of written and oral argument only, all other rights being available, practically, under Respondent's Rule 14 practice (14 C. F. R. § 302.14).

⁶The order is printed in Appendix B.

⁷The order is printed in Appendix C.

To suggest that the State must be confined to the role permitted under Rule 14 of the Board's Rules of Practice, is clearly erroneous. Rule 14 participation simply does not adequately protect the State. The reasons therefore were succinctly stated by Board Member G. Joseph Minetti in the *American Eastern Merger Case*:

"There are significant differences between participating in a proceeding under Rule 14 as a nonparty and participating under Rule 15 as a formal party permitted intervention. The most important of these is that in a very real sense persons participating under Rule 14 are cut off from the Board. They may participate in the hearing to the extent allowed by the Examiner, and present a written statement to him, but they have no opportunity to make their views known to the Board (except as their views may come to the Board's attention as part of the record before the Examiner). Rule 14 participants may not file exceptions to the initial or recommended decision, may not petition for review of an initial decision, may not file a brief to the Board, may not appear before the Board in oral argument, and may not petition for reconsideration of the Board's opinion and order.

"These are important procedural rights. It is one thing to have the right to present evidence and argument to the Examiner in a case that will take many months to try and will probably result in a voluminous evidentiary record. It is another thing to be able to present oral and written argument directly to the Board, and to address this argument to particular findings or omissions in an initial decision." Order E-18442, June 12, 1962.

The *Puerto Rico* doctrine has been followed by the Board regularly since in other proceedings, including so-

called "expedited" proceedings. *Pacific Northwest-Southwest Service Investigation*,^{*} Docket 15468, et al., the *Detroit-Toronto, Erie-Toronto Case*, Docket 16928, et al.,⁹ and the *Los Angeles/Chicago-Toronto Case*, Docket 16901, et al.¹⁰ In both of the latter the Petitioner here was an "off-segment" or "beyond" party, just as here; in those cases, moreover, several additional cities in Wisconsin sought and were granted intervention, while here the plea of the entire state and all its communities would be represented by a single party.

Against this line of precedent, precedent in so-called "expedited" cases, the Respondent has excluded Petitioner on the nebulous contention that grant of Petitioner's request would be contrary to the need for expedition. Wisconsin has the "requisite interest in the matter involved", as investor in the Milwaukee Airport, as statutory guardian of air service needs of the State, as the representative of Wisconsin's "consumers" of air transportation. *United Church of Christ v. F. C. C.*, Case No. 19409 (D. C. Cir., March 25, 1966); *Read v. Ewing*, 205 F. 2d 630 (2d Cir., 1953); *United States v. Public Utilities Comm'n*, 151 F. 2d 609 (C. A. D. C., 1945); *Associated Industries v. Ickes*, 134 F. 2d 694 (2nd Cir., 1943).

This Court has already answered the Respondent's argument:

"Efficient and expeditious hearing should be achieved, not by excluding parties who have a right to participate, but by controlling the proceedings so that all the

^{*}See, e.g., Order E-21757, February 3, 1965; E-21909, March 16, 1965.

⁹See, e.g., CAB Orders E-23619, April 29, 1966; E-23663, May 11, 1966; E-23704, May 19, 1966.

¹⁰See, e.g., Order E-23413, March 24, 1966; E-23475, April 5, 1966; E-23585, April 27, 1966; E-23695, May 17, 1966.

participants are required to adhere to the issues and to refrain from introducing cumulative or irrelevant evidence." *Virginia Petroleum Jobbers Association v. F. P. C.*, 265 F. 2d 364, 368 (D. C. Cir., 1959).

CONCLUSION

For the reasons stated above, we respectfully request this Court to set aside and vacate Order E-24082 and direct Respondent to give the Petitioner, State of Wisconsin, status as a formal party in the *Transpacific Route Investigation*.

Respectfully submitted,

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Attorney General of Wisconsin

GEORGE F. SIEKER
Assistant Attorney General

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Assistant Attorney General

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State of Wisconsin*

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APPENDIX A

Order No. E-14428

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 4th day of September, 1959

In the matter of the

TRANSPACIFIC ROUTE CASE

Docket No. 7723 *et al.*

ORDER GRANTING LEAVE TO INTERVENE

The Chicago Association of Commerce and Industry, State of Hawaii, Milwaukee Association of Commerce, State of Wisconsin, and the City of Tacoma, Washington, have filed petitions seeking leave to intervene; and

The Board finding that the said petitioners have a property, financial or other substantial interest in the subject matter of this proceeding which may not be adequately represented by existing parties, and that the granting of these petitions will not unduly broaden the issues or delay the proceeding;

IT IS ORDERED:

That the petitions of The Chicago Association of Commerce and Industry, State of Hawaii, Milwaukee Associa-

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tion of Commerce, State of Wisconsin, and City of Tacoma, Washington, for leave to intervene in this proceeding and be and they are hereby granted.

By the Civil Aeronautics Board:

/s/ MABEL McCART
Mabel McCart
Acting Secretary

(SEAL)

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APPENDIX B

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Order No. E-20256

Issued under delegated authority
DECEMBER 11, 1963

REOPENED SOUTHERN TRANSCONTINENTAL
SERVICE CASE

Docket 7984 *et al.*

ORDER GRANTING AND DENYING
PETITIONS FOR LEAVE TO INTERVENE

Petitions for leave to intervene in the above-entitled proceeding have been filed by the City and Chamber of Commerce of Dallas, the City and Chamber of Commerce of Ft. Worth, the City of New Orleans and the Chamber of Commerce of the New Orleans Area, the Commonwealth of Puerto Rico (Commonwealth), Continental Air Lines, Inc., Delta Air Lines, Inc. (Delta), National Airlines, Inc., and Trans World Airlines, Inc. Delta has filed an answer opposing the petition of the Commonwealth.

Pursuant to the authority delegated by the Board in the Board's Regulations, 14 CFR 385.11, it is found that each of the petitioners, except the Commonwealth, has a substantial interest in the subject matter of the proceeding which may not be adequately represented by existing

parties, and that the granting of their petitions will not unduly broaden the issues or delay the proceeding.

By Order E-20129, dated October 28, 1963, the Board reopened this proceeding to consider the single issue of whether Braniff or Eastern should be selected to operate the route between Miami/Ft. Lauderdale and Ft. Worth via St. Petersburg-Clearwater, Tampa, New Orleans and Dallas. While no part of the Commonwealth is on the route in question, it has an interest in the selection of carrier issue since it is the source of backup traffic and may be affected by beyond-segment services. However, this interest is not so substantial and direct as to warrant formal intervention.

The Commonwealth took part in the original proceeding pursuant to Rule 14 of the Rules of Practice in Economic Proceedings, and Rule 14 participation in the reopened case should allow for adequate protection of the Commonwealth's interest even though the scope of permissible participation under Rule 14 has been narrowed since the proceeding was originally heard.¹ Further, denial of the Commonwealth's petition is consistent with the Board's general policy with respect to intervention in the earlier phases of this proceeding, wherein formal party status was denied to all so-called "off-line" points outside the area of investigation.²

¹Rule 14 participants may present relevant evidence and a written statement concerning the issues prior to the conclusion of the hearing. However, they may not, as heretofore, submit briefs to the Examiner and the Board or participate in oral argument before the Board.

²See Order E-12861, August 5, 1958 and Order E-14206, July 10, 1959.

ACCORDINGLY, IT IS ORDERED:

1. That the petition for leave to intervene filed by the Commonwealth of Puerto Rico be and it hereby is denied, without prejudice to the petitioner's participation in the proceeding under Rule 14 of the Board's Rules of Practice in Economic Proceedings; and

2. That the petitions for leave to intervene filed by the following be and they hereby are granted: City and Chamber of Commerce of Dallas, the City and Chamber of Commerce of Ft. Worth, the City of New Orleans and the Chamber of Commerce of the New Orleans Area, Continental Air Lines, Inc., Delta Air Lines, Inc., National Airlines, Inc., and Trans World Airlines, Inc.

Persons entitled to petition the Board for review of this order pursuant to the Board's Regulations, 14 CFR 385.50, may file such petitions within ten days after the date of service of this order.

This order shall be effective and become the action of the Civil Aeronautics Board upon expiration of the above period unless before that date a petition for review thereof is filed or the Board gives notice that it will review this order on its own motion.

By ROBERT L. PARK
Hearing Examiner

HAROLD R. SANDERSON
Secretary

(SEAL)

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APPENDIX C

Order No. E-20427

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 3rd day of February, 1964

REOPENED SOUTHERN TRANSCONTINENTAL
SERVICE CASE

Docket 7984 *et al.*

ORDER GRANTING INTERVENTION

By Order E-20256, December 11, 1963, Examiner Robert L. Park, acting pursuant to delegated authority, denied intervention in the above entitled proceeding to the Commonwealth of Puerto Rico on the grounds that the Commonwealth's interest was not so substantial and direct as to warrant formal party status. Puerto Rico has filed a petition seeking review and reversal of the Examiner's order.

After consideration of Puerto Rico's petition and all the relevant facts, the Board has decided to grant review of Order E-20256, and allow Puerto Rico to intervene. This proceeding will consider the sole question of whether Eastern or Braniff should be selected to provide service over the Miami-Ft. Worth route. The Commonwealth points out that in the 12 months ending June 30, 1963, over 180,000

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revenue passengers enplaned and deplaned at San Juan on scheduled flights originating in or terminating at Miami. In addition, we note that the 1962 origination and destination data indicate approximately 16 passengers daily between San Juan on the one hand, and Dallas, Ft. Worth, and New Orleans on the other. Puerto Rico is thus a significant source of back-up traffic to the route under investigation in this proceeding. Moreover, Puerto Rico is served by one of the carrier applicants herein, and an award to that carrier could substantially affect the nature of the service available between Puerto Rico and the points involved in this proceeding.

Finally, Puerto Rico participated in the original proceeding as a Rule 14 party and was allowed to present oral argument to the Board. Subsequently, Rule 14 was changed to restrict the presentation which can now be made under the Rule. Thus, the effect of denying intervention to Puerto Rico would be to deprive the Commonwealth of the status which it enjoyed in the earlier phase of the case.

We will therefore grant Puerto Rico leave to intervene.

ACCORDINGLY, IT IS ORDERED THAT:

The petition of the Commonwealth of Puerto Rico to intervene be and it hereby is granted.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON
Secretary

(SEAL)

APPENDIX D

§ 1486. *Judicial review.*(a) *Orders subject to review; petition for review.*

Any order, affirmative or negative, issued by the Board or Administrator under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(b) *Venue.*

A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

(c) *Notice to Board or Administrator; filing of record.*

A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court, and the Board or Administrator shall thereupon file in the court the record, if any, upon which the order complained of was entered, as provided in section 2112 of Title 28.

(d) *Power of court.*

Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

(e) *Conclusiveness of findings of fact; objections.*

The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator, or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(f) *Review by Supreme Court.*

The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of Title 28. (Pub. L. 85-726, title X, § 1006, Aug. 23, 1958, 72 Stat. 795; Pub. L. 86-546, § 1, June 29, 1960, 74 Stat. 255; Pub. L. 87-225, § 2, Sept. 13, 1961, 75 Stat. 497.)

§ 1009. *Judicial review of agency action.*

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of review.*

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form of venue and proceedings.*

The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) *Acts reviewable.*

Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) *Relief pending review.*

Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) *Scope of review.*

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determina-

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tions the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. (June 11, 1946, ch. 324, § 10, 60 Stat. 243.)

